92-116

No. _____

SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SOCIETY OF SEPARATIONISTS, INC., et al
. . . . . Petitioners,

v.

GUY HERMAN, JUDGE OF THE TRAVIS COUNTY COURT AT LAW, et al

. . . . . Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 15, 1992

Austin, TX ▪ American Atheist Press ▪ (512) 458-1244

QUESTION PRESENTED FOR REVIEW

Whether an Atheist individual, who was excluded from the possibility of serving on a jury (by contempt jailing) for her objection to the religious manner of voir dire qualification testing for jury service, has standing to assert a Free Exercise and/or Equal Protection action, either as an individual or as a class representative and/or as a coplaintiff with an association dedicated to promoting and safeguarding the rights of Atheists and other non-religious persons.

LIST OF ALL PARTIES

ROBIN MURRAY-O'HAIR, and
SOCIETY OF SEPARATIONISTS, INC.,
Petitioners and Plaintiffs/Appellants below;

The HONORABLE GUY HERMAN, Judge
Travis County Court at Law,
Respondent and Defendant/Appellee below; and

The HONORABLE DAN MORALES, Attorney General
for the state of Texas,
Intervenor in the Court of Appeals.

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TRCP, §226

OATH TO JURY PANEL. Before the parties or their attorneys begin the examination of the jurors whose names have thus been listed, the jurors shall be sworn by the court or under its direc-

tion, as follows: "You, and each of you, do solemnly swear that you will true answers give to all questions propounded to you concerning your qualifications as a juror, so help you God."

TRCP, §236

OATH TO JURY. The jury shall be sworn by the court or under its direction, in substance as follows: "You, and each of you, do solemnly swear that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law, as it may be given you in a charge by the court, and to the evidence submitted to you under the rulings of the court. So help you God."

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, on rehearing en banc (overruling the panel opinion previously issued), holding that the individual Plaintiff/Petitioner had no standing to bring the action; that there is no certifiable class of person situated similarly to the individual Plaintiff/Petitioner; and that the associational Plaintiff/Petitioner lacked associational standing (reported at 960 F.2d __ , (5th Circuit April 17, 1992), (cited henceforth as "Slip. Opp.")), appears in the Appendix.

The opinion rendered by the panel of the Fifth Circuit, awarding declaratory relief to the Plaintiffs/Petitioners (reported at 939 F.2d 1207 (5th Cir. 1991)), appears in the Appendix.

The opinion of the United States District Court for the Western District of Texas, Austin Division, granting summary judgment for the Defendants/Respondents and denying that of Plaintiffs/Petitioners (which was not reported), appears in the Appendix.

JURISDICTION

The certiorari jurisdiction of this Court is invoked on the grounds that (a) the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and (b) the United States Court of Appeals for the Fifth Circuit has decided a question of federal law in a way which conflicts with applicable decisions of this Court. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. Section 1254.

The judgment of the United States Court of Appeals for the Fifth Circuit, en banc, was entered on April 17, 1992. This petition for certiorari was filed within 90 days of that date and is therefore timely. Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. Section 1291 and jurisdiction in the District Court was invoked under 28 U.S.C. Section 1331 and 1343(1).

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

[Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:]

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below:

Petitioners, an individual and an organization dedicated to promoting and safeguarding the interests and rights of Atheists and other nonreligious persons, filed their Original Complaint in this action on November 16, 1989, seeking preliminary and permanent injunctive relief, a declaratory judgment and damages against Judge Guy Herman, Probate Judge of Travis County, Texas, and other Travis County Defendants. Petitioners sought class action certification under Rule 23 of the Federal Rules of Civil Procedure complaining of the method of testing and qualifying summoned, prospective jurors for truthfulness before questioning at voir dire to then be seated on a criminal or civil jury. Petitioners specifically complain of the effect and exclusionary result of Atheist and other nonreligious prospective jurors objecting to the statutorily prescribed method of truth testing (or "swearing") on Free Exercise and Equal Protection grounds. Damages were initially sought for the contempt jailing of the individual Petitioner.

The District Court disposed of the case on cross motions for summary judgment ruling for the Defendants and against the Plaintiffs on every issue. The court first denied class certification, then dismissed the associational Plaintiff. The court held that Plaintiffs' claims were res judicata based on a prior Establishment Clause case (Murray v. Travis County District Court, 898 F.2d 150 (5th Cir.) (unpub. opin.), cert. den., 111 U.S. 75 (1991)), and that all the named Defendants were immune or otherwise not amenable to suit. The court ruled that Rule 11 sanctions were appropriate; however, this portion of the judgment was amended denying sanctions.

On appeal to the United States Court of Appeals for the Fifth Circuit, a panel of the court of appeals considered the case on briefs without oral argument. On August 28, 1991, the panel reversed the District Court's final summary judgment on the dismissal of the associational Plaintiff and issued declaratory relief. The panel also held that the action was not precluded or in any

way controlled by Murray, but that all Defendants other than Judge Herman were properly dismissed. A dissenting opinion was filed which disputed the propriety of an award of declaratory relief.

On November 1, 1991, a majority of the judges of the Fifth Circuit ordered the case reconsidered en banc and oral argument was heard on January 21, 1992. Argument and questions from the judges concerned only the Free Exercise and Equal Protection issues and did not touch upon the standing issue. On April 17, 1992, the en banc court overruled the panel decision and held, without reaching the merits, that (1) there was no certifiable class; (2) the associational Plaintiff lacked associational standing, and (3) the individual Plaintiff lacked standing to seek prospective equitable relief because her particular claim for such relief was essentially moot.

Statement of Facts

Petitioner Robin Murray-O'Hair appeared, as summoned, in the County Courthouse of Travis County, Texas, ready, able, and generally qualified to serve on a jury for the Travis County Court system. When the prospective jurors were told to rise to take the juror voir dire or venire oath, Miss Murray-O'Hair objected to such oath as a religious statement or ceremony. The entire proceeding halted and Miss Murray-O'Hair was called to the bench by Defendant Judge Herman who asked her why she did not want to take the statutorily prescribed oath. Miss Murray-O'Hair stated her objection that the mandatory oath (which pursuant to Texas Rules of Court, Rule 226 and Texas Rules of Criminal Procedure, Rule 35.02 contains the phrase or prayer ". . . so help you God") was clearly a religious exercise in which she, as an Atheist, could not participate. Judge Herman then attempted to administer "the affirmation," which, as stated by Judge Herman also included the phrase "so help you God." Miss Murray-O'Hair again refused to make this statement. Judge Herman told her to be seated in the front of the courtroom and the other jurors were sworn using the statutorily prescribed oath. Miss Murray-O'Hair was then told to proceed to Judge Herman's regular courtroom

("Probate Court Number 1"), where Judge Herman again prepared to administer the statutorily prescribed oath (which still included the phrase "so help you God") to Miss Murray-O'Hair. She again refused. Judge Herman again asked for her reasoning. Judge Herman then prepared to administer to her "the affirmation," this time without reference to God. Miss Murray-O'Hair explained her conviction that an affirmation is as religious as an oath, irrespective of the use of the word "God," and again refused to make the statement. Miss Murray-O'Hair was then held in contempt of court and placed in the Travis County jail for an indefinite period of time. Miss Murray-O'Hair was later released on bond. Judge Herman subsequently "excused" her from jury service and commuted the contempt sentence to time served. Miss Murray-O'Hair never entered the jury selection process.

Court of Appeals Jurisdiction

Jurisdiction in the Court of Appeals was properly invoked pursuant to 28 U.S.C. Section 1291.

SUMMARY OF ARGUMENT

The Fifth Circuit, en banc, without argument or briefs on the point, made a sua sponte finding that Petitioners, Robin Murray-O'Hair and the Society of Separationists, Inc., have no standing to complain of their exclusion from the Texas (Travis County) jury system. This is so, said the Fifth Circuit, because this Court's decision in Los Angeles v. Lyons, 461 U.S. 95 (1983), prevents a litigant from obtaining standing merely because of "past exposure to illegal conduct." 461 U.S. at ___ . Under Lyons , in order for a litigant to have standing, there must be "sufficient likelihood that he will again be wronged in a similar way . . ." 461 U.S. at ___ .

The Fifth Circuit's holding implicates at least two issues arguably worthy of this Court's attention, one narrow and one broad. The narrow issue is whether, as the Fifth Circuit found, this case is sufficiently analogous to Lyons so as to preclude Petitioners' standing. Petitioners contend that this case is analytically distinct from Lyons in that, as Judge Goldberg observed below (in dissent), there is not only a likelihood, but a virtual statistical certainty that the Petitioners will be subject again to similar (wrongful) conduct. Society of Separationists, Inc. v. Herman, 959 F.2d 1283, 1292 (1992).

The broader issue is whether, as Judge Weiner observed below (in concurrence), this case "offers the Supreme Court a principled way to limit the Lyons doctrine so that justice can be done in cases like O'Hair's." 959 F.2d at 1289.

Judge Weiner's observation was prompted by the recognition that the Fifth Circuit's en banc opinion effectively deprives Petitioners here from ever having their case heard, although a panel of that Court earlier found that persons such as Petitioners are deprived of their constitutional rights by the practices of the Travis County Court. Unlike Lyons, Petitioners' encounter with the assertedly unconstitutional conduct in issue is not dependent upon a completely aleatory and unpredictable act such as Petitioners' violation of a criminal law. Rather, all Petitioners need do to ensure a similar collision with the Travis County jury system is maintain their registration as voters, and invoke their right under the First Amendment not to repeat an oath repugnant to

their conscience. Petitioners submit that this Court needs to reconsider or refine the Lyons doctrine to address situations, such as the one here, where, because the illegal conduct is ongoing but sporadic, no single injury can be predicted with absolute certainty, but the fact that an injury will occur in due time to someone is a virtual certainty.

Petitioners' other arguments are, briefly, that (1) the Fifth Circuit adopted an unduly and exceptionally narrow view of Petitioners' stake in the outcome of this litigation, limiting it to "avoiding jail," and (2) the Court en banc erred in its analysis of the associational standing precepts set forth in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, (1977).

ARGUMENT

Introduction

The State of Texas requires that potential jurors be sworn to answer voir dire questions truthfully, using the phrase or prayer "so help me God" (Texas Rules of Court, Rule 226 and Texas Code of Criminal Procedure, Rule 35.02). This requirement has the effect of excluding nonreligious persons with conscientious objections to such exercises from sitting on juries or even advancing to the voir dire stage of the selection process in Texas. Strict enforcement of this religious oath requirement has resulted in the exclusion of Petitioners and others similarly situated from the Texas (specifically, the Travis County) jury selection process.

Petitioners, along with others, have previously complained of the unfortunate Texas jury selection process on Establishment Clause grounds but were dismissed out of hand, essentially for the reason that "the right to serve on a jury is not a constitutionally protected one." Murray v. Travis County District Court, 898 F.2d 150 (5th Cir.) (unpub. opin.) cert. den., 110 U.S. __ , (1990), (opinion of Fifth Circuit included in Appendix hereto). Petitioners submit that the holding in Murray should be reconsidered in light of this Court's recent decisions protecting the right of persons to sit on juries. See, Powers v. Ohio, __ U.S. __ , 111 S.Ct. 1364 (1991); Edmondson v. Leesville Concrete Co., 500 U.S. __ (1991). Most recently, in Georgia v. McCollum, No. 91-372, __ U.S. __ (1992) (decided June 18, 1992), this Court reaffirmed its ruling in Edmonson, supra, that exclusion of a juror for a discriminatory reason "constitute[s] an impermissible injury to the excluded juror" __ U.S. at __ (emphasis added). At best, it is anomalous to suggest that it would be any less of an "impermissible injury" for a juror to be wrongfully excluded as a result of a violation of the Establishment Clause, than as a result of violation of the Equal Protection Clause of the Constitution.

The ramifications of these holdings for the case sub judice and for the jury system in general are truly far-reaching. For if, as noted above, it is the individual juror who suffers an injury when wrongfully excluded, it is quite clear that Petitioners' "interest" in

the outcome of this litigation, for standing purposes, cannot be limited to "avoiding jail." Rather, Petitioners would be seeking to redress the wrongful deprivation, under color of state law, of a primal right of citizenship protected by the Constitution. Indeed, Petitioners urge this Court to recognize that the Edmonson-McCullom line of cases does protect the right of Petitioners here to sit on juries. And, of course, acknowledgement of such protection for the individual juror would change the "standing" analysis entirely. The Fifth Circuit failed to consider this line of reasoning and concluded that Petitioners' interest, for standing purposes, was limited to not being jailed again by Judge Herman. In the light of this Court's recent "juror" jurisprudence, Petitioners submit that the Fifth Circuit's standing analysis was unduly narrow and inadequate and should be reversed.

Because there are two Petitioners here, one an individual and one an association, the issues surrounding their respective standing must be discussed separately. The following analysis demonstrates that each Petitioner has standing to pursue this cause of action.

Individual Standing

For its holding that Miss Murray-O'Hair lacks individual standing as a sole litigant, the en banc Court of Appeals relied upon the line of cases from this Court which culminated with City of Los Angeles v. Lyons, 461 U.S. 95 (1983).[1]

Lyons involved a constitutional challenge to the use of chokeholds by Los Angeles' police officers. This Court found that the lone plaintiff therein could not establish a sufficient threat of similar injury in the future to justify prospective equitable relief. Any hypothetical threat was based upon a long chain of speculative contingencies including, the Plaintiff again coming under suspicion of criminal activity; being detained by police officers; resist-

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[1]See also Ashcroft v. Mattis, 431 U.S. 171 (1977); Rizzo v. Goode, 423 U.S. 362 (1976); and O'Shea v. Littleton, 414 U.S. 488 (1974).

ing the detention; and then again being chokeheld in an improper manner. Under these circumstances, as a statistical matter, it is altogether uncertain that the Lyons Plaintiff would ever again have a live and justiciable controversy pertaining to the Los Angeles chokehold maneuver. Accordingly, the Plaintiff's claim for nonprospective relief in Lyons was moot and he did not have standing to be awarded prospective relief.

As noted in Circuit Judge Goldberg's dissent to the en banc opinion (Slip. Opp. at 4197), the Plaintiff in the Lyons line of cases all had controversies which, for standing purposes, were contingent upon the inherently dubious recurrence of criminal activity — an area over which the potential Plaintiff has some control.

In the case sub judice, there are no contingencies: Miss Murray-O'Hair herself will again be called for jury duty. She still resides in Travis County; is still registered to vote (and is thus in the Travis County jury selection pool); and is not otherwise disqualified from jury service. Miss Murray-O'Hair has twice before been summoned for jury service and was excluded under varying circumstances on each of those prior occasions.[2] The justiciability of this case relating to the standing of Miss Murray-O'Hair does not depend upon any chain of speculative contingencies nor the commission of any criminal acts on her part. With no impetus from Miss Murray-O'Hair (other than periodically reregistering to vote), she will again be summoned before the very court which is a party-Defendant to this action. Surely this fact along with Petitioners' clear personal stake in the outcome of this litigation allows this Court to find that the constitutional issues presented in this case are live and razor sharp. Particularly is this so, when the facts are construed in light of this Court's recent jurisprudence protecting the right of individuals to sit on juries (See, supra, p. 17. Lyons and the other cases concerning prospective equitable relief based on past exposure to illegal conduct with no serious threat of future recurrences are, thus, inapposite.[3]

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[2]One of these occasions formed the basis for the Murray case of which she was a Plaintiff.

[3]Judge Goldberg's dissent (Slip. Opp. at 4200-4204), discusses at length the statistical certainty of a recurrence of the circumstances at issue sub judice. In

The court of appeal's attempt to distinguish and circumvent the holding of County of Riverside v. McLaughlin, ___ U.S. ___, 111 S.Ct. 1661 (1991) (certifiability of class in civil rights, prospective relief suit involving state treatment of persons accused of criminal activity avoided the mootness/standing rule of Lyons) is faulty for several reasons. The presence in this suit of the Society as an associational Plaintiff representing the interests of its Texas (or Travis County) members who are summoned for jury duty — like the presence of a class — broadens the element of party-Plaintiff standing in this suit. The present controversy between Miss Murray-O'Hair and Judge Herman may have subsided but there is a virtual statistical certainty that she and other members of the Society will again be summoned for jury duty in Texas (and Travis County) and will face the same or similar unconstitutional, exclusionary result. Thus, like the class of persons in Riverside, the individual and associational Petitioners have a live grievance and, thus, standing.

Furthermore, Miss Murray-O'Hair, as an individual Plaintiff, continues to have individual standing to assert this action, even in its narrowest factual setting, for the reason that there is a real and immediate threat that she will again be summoned for jury duty before Judge Herman himself. There is no speculative fluke or chain of unlikely events which will lead to a recurrence of the situation which forms the basis of this suit. Miss Murray-O'Hair need only be summoned for jury duty and Judge Herman need only preside over the pool which will include her. Thus, even viewed as a lone Plaintiff, as the en banc majority would, there is a statistical certainty that Miss Murray-O'Hair herself will again be summoned for jury duty before Judge Herman.[4]

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fact, as Judge Goldberg's opinion points out (Slip. Opp. at 4199, nt. 2), Petitioners' summary judgment proof showed that there was a recurrence of the exact situation complained of herein involving another summoned member of the Society and Judge Herman. On this occasion, however, Judge Herman did not jail the objecting potential juror but excused him and sent him home without ever entering the jury selection process.

[4]It should again be noted that the summary judgment evidence adduced in the District Court demonstrated that Judge Herman still presides over jury venires

Relevant to the general issue of standing are several other cases from this Court, some from last term, dealing with the issue of discriminatory exclusion of jurors. In Carter v. Jury Commission, 396 U.S. 320, 330 (1970) (suit alleging racially discriminatory jury selection brought by the excluded potential jurors), this Court stated that,

> Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here.

In Carter, Justice Stewart held that criminal defendants do not have the only cognizable legal interests in nondiscriminatory jury selection and that the summoned potential jurors excluded because of their race are as much aggrieved as those indicted and tried by the constitutionally defective juries. Id. at 329. Justice Stewart went on to hold that however jury service is to be characterized (as a right, duty or privilege), once a state chooses to provide juries it must ensure that they are chosen in a manner consistent with the mandates of the Equal Protection Clause.[5]

In terms of standing, this case is practically indistinguishable from Carter, other than the fact that, here, in addition to an individual Plaintiff there is also an associational Plaintiff. Had the

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and continues to coerce summoned potential jurors to make statements against conscience in violation of their Free Exercise rights and, upon objection, excludes these persons from the opportunity to serve on a jury in violation of their Equal Protection rights.

[5]There is, however, authority that the opportunity to be chosen for jury service is a constitutionally protected right in itself. In Theil v. Southern Pacific Co., 328 U.S. 217, 220 (1945), this Court stated that "jury service is a duty as well as a privilege of citizenship," and "an essential right." Id. at 224. See also Lockhart v. McCree, 476 U.S. 162, 176 and Buchanan v. Kentucky, 483 U.S. 402, 416 (1987) (total denial of jury service (i.e., the opportunity to serve) is a deprivation of one of the "basic rights of citizenship"). Most recently, in the trilogy of cases Powers, supra, Edmonson, supra, and McCollum, supra, this Court has admonished lower courts that the wrongful exclusion of a juror is an "impermissible injury to the juror." (See discussion supra pp. 17). In light of these holdings, the Murray decision is all the more perplexing.

N.A.A.C.P. desired to represent the individual plaintiff and/or the class in Carter, that organization would surely have been an appropriately representative association for the same reason that the Society is in this case.

Last term in Powers v. Ohio, __ U.S. __, 111 S.Ct. 1364 (1991), this Court had occasion to address the impediments faced by a juror seeking relief from wrongful exclusion. The opinion, 111 S.Ct. at 1372, speaks generally of the practical challenges that a potential juror faces in having a claim of jury exclusion heard and specifically of the justiciability problems associated with an action instituted by a juror struck at the challenge stage of voir dire. Those problems would include the lack of financial incentive to file a constitutional action; the fact that the person excluded is not a party to any pending lawsuit in the summoning court; and the fact that the juror may not even be aware of the reason for the strike. The Court also notes, citing Lyons, that,

> it would be difficult for an individual juror to show a likelihood that discrimination against him at the voir dire stage [after qualification or swearing] will recur.

By this the Court meant that at the voir dire stage of the jury selection process, a particular juror who is preemptively struck would have difficulty demonstrating a credible threat of a similar future exclusion. The juror would have no individual standing since it would be unlikely that the same person would be called for jury duty, then again be improperly peremptorily excluded from serving by a prosecutor (or the defendant, see McCullom, supra) in a criminal case. The potential juror could end up sitting on a civil case or on the type of criminal case for which the prosecution would not desire to peremptorily challenge that person. In short, the situation involves a chain of unlikely and speculative contingencies.

By contrast, in this case, as Judge Goldberg noted in dissent,

> [a]lthough no single plaintiff can predict with certainly when exactly he will be summoned to serve, we can rest assured that these plaintiffs will be summoned in due time

particularly under the random jury selection system. 959 F.2d at 1292.

Moreover, Judge Goldberg also observed that

> The [Petitioners] can reasonably anticipate similar encounters with Judge Herman in the future when they are summoned to serve as jurors in Travis County. The record reflects that Judge Herman continues to serve on the County Court, and accordingly, there is a quantifiable, mathematical certainty that he will again preside over jury impanelment and encounter O'Hair or some other member of the Society of Separationists among the prospective jurors. 959 F.2d at 1292, (footnote omitted).

In short,

> [Petitioners] in this "case" have a personal stake in the outcome and the constitutional issues presented are razor sharp: the [Petitioners] are atheists who object to the mingling of religion in governmental activities . . . Whatever one might think of the constitutionality of Judge Herman's practice, . . . no one should doubt that this litigation presents a case and controversy within the meaning of Article III of the Constitution. 959 F.2d at 1291.

Associational Standing

Petitioners submit that the Fifth Circuit further erred when it held that the Society of Separationists, Inc. should be dismissed for lack of standing. The Society (the head office of which happens to be in Travis County, Texas) is an organization dedicated to the separation of government and religion and advances the rights of its Atheist and other nonreligious members throughout the United States. The Society attempts to achieve many of its stated goals through the use of litigation such as this to ensure that religious discrimination, particularly that perpetrated by governmental actors, is not committed against its members.

Under certain circumstances, a membership organization such as the Society may bring an action solely as a representative of its members, "[e]ven in the absence of injury to itself."

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, then the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth v. Seldin, 422 U.S. 490, 511 (1975). In reaffirming Warth on this point, this Court enunciated a three-part associational standing test in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), as follows: (1) association's members, or some of them, have standing; (2) the interests it seeks to protect are germane to the association's purpose; and (3) participation of individual members is not necessary. The Society clearly fulfills each of these standing prerequisites in this action asserting the prospective relief claims of its Texas members, which include Miss Murray-O'Hair, the other person excluded from jury service by Judge Herman (see footnote 7 above), and the members of the Society who will be called for jury service in the State of Texas, in Travis County or before Judge Herman.

As to the first prong of the Hunt test, the discussion relating to the inappropriate narrowness with which the Court of Appeals characterizes Petitioners' claims, supra, explains that Miss Murray-O'Hair, as well as every other member of the Society who will ever be summoned for jury duty in the State of Texas, has shown a sufficient threat of future injury to establish that they have individual standing. See also Judge Goldberg's dissenting opinion, Slip. Opp. 4197-4204.

Again, the jury service exclusion which forms the factual basis

of this action is the most extreme example in the ongoing scheme or pattern of exclusion, dismissal or disqualification of nonreligious persons practiced by the courts of the State of Texas and particularly those of Travis County. Miss Murray-O'Hair herself has twice before been disqualified or "dismissed" from the jury selection process at the pre-voir dire stage. Many other members of the Society have suffered the same treatment after being summoned for jury duty and the evidence in the District Court reflects the dismissal of another such member of the Society immediately following the filing of the Original Complaint by the same Defendant Judge Herman. See also Murray (opinion included in the Appendix hereto). As Judge Goldberg noted in his dissent there is a virtual statistical certainty that some member of the Society, or even Petitioner herself will be subjected to the same treatment. Thus the first Hunt prong is satisfied.

As to the second prong of the Hunt test, there is no dispute that the issues involved in this action are germane to the corporate purposes of the Society. The majority of the en banc Court of Appeals, Judge Wiener (concurring in part and dissenting in part), and Judge Goldberg (dissenting), all agree on this point.

As to the third prong of the Hunt test, the prospective equitable relief requested by Petitioners would equally benefit each and every member of the Society. Contrary to the unsupported statement of the Court of Appeals that there is a diversity of views as to the propriety of the Texas jury selection procedure within the membership of the Society, the claim that Atheists and other nonreligious persons should not be singled out in open court then dismissed from the opportunity to serve on a jury, implicates and concerns the entire membership of the Society. Though this action is based upon a particularly egregious factual predicate, neither the particular participation of Miss Murray-O'Hair, nor any other individual, is essential for an award of prospective equitable relief.

As fleshed-out in the District Court's opinion on summary judgment, every member of the Society, as a matter of conscience, objects to the course of Texas juror qualification. Every member of the Society objects to the use (as statutorily required) of the "so help you God" oath in order to qualify as a Texas juror.

Every member of the Society condemns the predicament of publicly, in open court, exposing personal religious (or nonreligious) preference in order to (sometimes) qualify for jury service. Furthermore, every member of the Society objects to the use of affirmations. In short, no member of the Society may conscientiously partake in the jury qualification process in the courts of the State of Texas.

The court of appeals also suggests that associational standing is never appropriate in Free Exercise Clause cases. This is contrary to case law of both this Court and the Fifth Circuit. See Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) (Free Exercise case; associational standing not disputed) and Church of Scientology v. Cazares, 638 F.2d 1272, 1276–80 (5th Cir. 1981) (church would have standing to assert Free Exercise claims of its members — third prong of the Hunt test discussed). In any event, the rationale that associational standing in Free Exercise cases is sometimes inappropriate stems from the fact that participation of individual members in such cases is often necessary when the claims made and the relief sought would inure, in varying degrees, to the benefit of particular members. Retrospective damage relief (of the sort now abandoned by the Petitioners herein) may be of this nature. Again, the prospective equitable relief sought by Petitioners implicates a pure question of law: Whether Atheists and other nonreligious persons may be excluded from the possibility of serving on a jury for their objection to the religious manner of voir dire qualification testing for jury service on Free Exercise and Equal Protection grounds.

The Court of Appeals also held that the Society fails the third Hunt prong since there is no evidence in the record dispelling the notion that there is a diversity of views within the Society on matters of conscience. Even if there were some diversity of opinion within the Society, U.A.W. v. Brock, 477 U.S. 274 (1986), and its progeny indicates that conflicting member interests will not preclude associational standing. See also Judge Wiener's concurring and dissenting opinion, Slip. Opp. at 4195, where he specifically dissents from the Hunt third prong holding of the en banc majority. Judge Goldberg's dissent also deals at length with this issue.

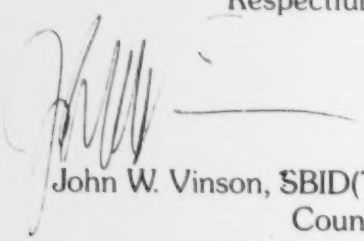
Both this case and the Murray case establishes that there is a continuing Travis County pattern of summoning potential jurors, coercing or attempting to coerce all such persons to take the oath, and after objection, coercing or attempting to coerce the affirmation, followed by the exclusion, dismissal, and/or jailing of those persons. The Society clearly has standing to bring this action as an associational representative.

Conclusion

Petitioners have individual and associational standing to be awarded prospective equitable relief in this Title 42 U.S.C Section 1983/Equal Protection action involving the exclusion from the jury selection process of persons who conscientiously refuse to make religious statements on Free Exercise grounds. There also exists a valid, certifiable class of nonreligious persons situated similarly to Miss Murray-O'Hair.

For the above reasons this Court should grant certiorari to review the judgment of the Fifth Circuit, en banc, reverse that Court's decision and, remand to the District Court for the trial of this cause.

Respectfully Submitted,



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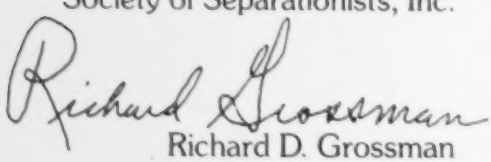


Richard D. Grossman
Attorney for Petitioner:
Robin Murray-O'Hair

CERTIFICATE OF SERVICE

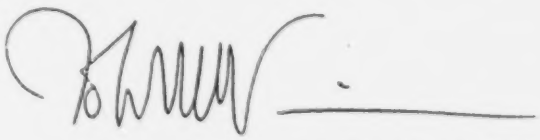
I, John W. Vinson, hereby certify that I have mailed copies of the foregoing Petition for Writ of Certiorari to:

1. Mr. Jim McCormack
   Assistant County Attorney
   Travis County, Texas
   P.O. Box 1748
   Austin, TX 78767,

2. Mr. Javier Guajardo
   Assistant Attorney General
   P.O. Box 12548
   Austin, TX 78711-2548

on or before the 15th day of July 1992, in duly addressed envelopes, with postage prepaid, return receipt requested.

I certify under penalty of perjury that the foregoing is true and correct. Executed on July 15, 1992.



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APPENDICES

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8660

SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellants,

versus

GUY HERMAN, Judge of the Travis County Court at Law, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(April 17, 1992)

Before POLITZ, Chief Judge, GOLDBERG, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, E. GARZA, and DeMOSS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Robin Murray-O'Hair and the Society of Separationists alleged that a state judge excluded O'Hair from a venire and held her in contempt because she refused on religious grounds either to swear or to affirm to answer voir dire questions truthfully. They sought damages as well as declaratory and injunctive relief for violating their rights under the Free Exercise Clause of the First Amendment. The district court granted defendants' motion for summary judgment, and a divided panel of this court agreed that immunity barred an award of damages. The panel granted a declaratory judgment, however, which dictated how state judges should handle a prospective juror's refusal to swear or affirm in

the future. We granted rehearing en banc and, without reaching the underlying merits, conclude that plaintiffs lack standing to seek a prospective remedy.

I.

O'Hair is an atheist and a member of the Society of Separationists, a national atheist organization dedicated to the separation of church and state. In December of 1987, she was summoned and appeared for jury duty in Travis County, Texas. A deputy court clerk told the prospective jurors to rise and take the oath which Texas requires before voir dire questioning. O'Hair objected to taking an oath, explaining that she was an atheist and could not participate in such religious exercises. Judge Guy Herman called her to the bench and told her that in lieu of an oath, she could affirm that she would answer the voir dire questions truthfully. She stated that she also considered an affirmation religious and therefore could not affirm. Judge Herman told her to be seated while the other jurors were sworn in. He then directed her to his regular courtroom for a full hearing.

At this hearing, O'Hair was accompanied by her attorney. The judge said that he respected O'Hair's constitutional right to freedom of religion and therefore would "offer an affirmation without any recognition or any statement, any reference to God or anything of that nature." O'Hair again refused, repeating her belief that an affirmation was just as religious as an oath. The judge then explained that O'Hair could be held in civil contempt if she refused and that he was not asking her to take an oath and swear to God as to her qualifications for jury service. He was only asking her to affirm that she would give true answers to whatever questions were propounded to her. O'Hair replied that an affirmation was in her understanding a religious statement. No specific form of affirmation was tendered by Judge Herman. The judge did not ask O'Hair what form of assurance of truthfulness would meet her objections, and O'Hair offered none. When she continued to refuse to affirm, Judge Herman found her in civil contempt. She was jailed and released on bond approximately six hours later. O'Hair filed a petition in Travis County district court

for a writ of habeas corpus, which was rendered moot when Judge Herman commuted her contempt sentence to the six hours served.

O'Hair and the Society of Separationists then sued Judge Herman, Travis County Judge Bill Aleshire, Travis County, the "Travis County court system," and the clerk, sheriff, and court bailiffs of Travis County in federal district court. They asked the court, inter alia, to "declare the juror oath practice as engaged in by defendants (a judicial coercion of a religious exercise) to be unconstitutional under the First Amendment" and to "grant injunctive relief, both temporary and permanent, against the continuation of such unconstitutional jury oath practices by judges and other public officials." They also sought $2 million in actual damages and $3 million in punitive damages.[1]

The district court granted defendants' motion for summary judgment. A divided panel of this court affirmed in part, reasoning that all of the defendants other than Judge Herman were either immune, were nonexistent entities, or were otherwise improperly named. They found Judge Herman immune from suit for damages, but recognized that judicial immunity did not bar prospective equitable relief. They concluded that the judge erred in debating the correctness of O'Hair's religious beliefs rather than asking her what sort of pledge she could make to commit herself to tell the truth. Although they found injunctive relief unnecessary, they issued a declaratory judgment requiring judges to ask prospective jurors who object to the oath or affirmation requirement what form of serious public commitment would accord with their constitutionally protected beliefs.

II.

Article III of the Constitution confines the federal courts to deciding actual cases and controversies. Allen v. Wright, 104 S.

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[1] Appended to the complaint was the affidavit of one other atheist who had been excused from jury service by Judge Herman because he refused to affirm. This individual was not held in contempt or jailed, however.

Ct. 3315, 3324 (1984). The rule that litigants must have standing to invoke the power of the federal courts is perhaps the most important doctrine stemming from the case or controversy requirement. Id. Standing defies precise definition, but at the least insists that the complained of injury be real and immediate rather than conjectural, that the injury be traceable to the defendant's allegedly unlawful conduct, and the relief from the injury must be likely to follow from a favorable ruling. Id.

In City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), the Supreme Court made clear that plaintiffs may lack standing to seek prospective relief even though they have standing to sue for damages. Lyons was a Los Angeles area resident who was subjected to a chokehold by city police officers when he was stopped for a traffic violation. He obtained a preliminary injunction which prohibited the police department from using the chokehold unless death or serious bodily injury were threatened. The Court reversed. It observed that " 'past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' " Lyons, 103 S. Ct. at 1665 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. Lyons lacked standing to obtain an injunction because it was entirely speculative that police officers would stop him again and choke him without provocation. Similar reasoning has been applied to suits for declaratory judgments. Ashcroft v. Mattis, 431 U.S. 171 (1977); Golden v. Zwickler, 394 U.S. 103 (1969).

O'Hair lacks standing to obtain prospective relief for the same reason that Lyons did. She suffers no continuing harm as a result of Judge Herman's actions. Nor can she show a real and immediate threat that she will again appear before Judge Herman as a prospective juror and that Judge Herman will again exclude her from jury service and jail her for contempt. There are over half a million residents in Travis county and twenty trial judges. The chance that O'Hair will be selected again for jury service and that Judge Herman will be assigned again to oversee her selection as a juror is slim. Judge Herman's regular duties do not include

such matters. Even if O'Hair were likely to appear before Judge Herman in the future, there is little indication that they would interact in the same fashion. It is clear that the judge was not acting pursuant to any state or local rule or statute, or even some personal policy, when he failed to ask O'Hair if there were alternative ways in which she would be willing to commit herself to tell the truth.[2] Nor is there any reason to believe that O'Hair was acting on religious scruples in failing to propose such an alternative. Whatever the abstract merit of O'Hair's complaint, it springs from a lack of communication between judge and prospective juror that is inherently contextual and episodic.

This court and others have often held that plaintiffs lack standing to seek prospective relief against judges because the likelihood of future encounters is speculative. In Adams v. McIlhany, 764 F.2d 294, 299 (5th Cir. 1985), a Texas judge held a woman in contempt and jailed her because she had impugned his integrity in a letter. We found the judge immune from suit for damages and held that no case or controversy existed with respect to declaratory or injunctive relief. We explained that it was most unlikely that the plaintiff would again come into conflict with the judge in similar circumstances, and with the same results. In Schepp v. Fremont County, 900 F.2d 1448, 1452-53 (10th Cir. 1990), the Tenth Circuit confronted a §1983 suit against a state judge who revoked plaintiff's probation. The court held that the judge was immune from suit for damages and that there was no actual controversy warranting the issuance of declaratory relief. The probability that plaintiff would ever again be subject to probation revocation proceedings before this judge was extremely remote.

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[2] The Texas laws requiring oaths or affirmations have been narrowed by the Texas courts to mean that such oaths are to be administered in the manner most binding on the individual conscience. Madeley v. Kern, 488 F.2d 865 (5th Cir. 1984); Craig v. State, 480 S.W.2d 680 (Tex.Cr. App. 1972). See also Tex. Const. Art. 1 §5; Vaughn v. State, 177 S.W.2d 59 (Tex. Crim. App. 1944). These authorities establish what is really undisputed between the parties, namely that, apart from recognition that it is being made subject to the pains and penalties of perjury, Texas law does not require any particular form of words for an oath or affirmation.

Similar cases are legion. See e.g., Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1019-20 (D.C. Cir. 1991); Johnson v. Moore, 948 F.2d 517, 521-22 (9th Cir. 1991); Foster v. Basham, 932 F.2d 732 (8th Cir. 1991); Northern Virginia Women's Medical Center v. Balch, 617 F.2d 1045, 1048-49 (9th Cir. 1980); see also Brown v. Edwards, 721 F.2d 1442, 1446-47 (5th Cir. 1984).

We must not shrink from our duty to decide a controversy, but that duty includes faithful obedience to the limits of our mandate. It is beyond our mandate to issue prospective relief every time a state actor arguably infringes a constitutional right. As the Supreme Court said in Lyons, "[i]n exercising their equitable powers federal courts must recognize 'the special delicacy' of the adjustment to be preserved between federal power and State administration of its own law." 103 S. Ct. at 1670. Principles of comity and federalism, in addition to Article III's jurisdictional bar, mandate that we intervene in the management of state courts only in the extraordinary case. Id.; Pulliam v. Allen, 104 S. Ct. 1970, 1979, (1984).

The Court has been reluctant to superintend state judges in the past. In O'Shea v. Littleton, 414 U.S. 488 (1974), nineteen black residents of Cairo, Illinois, requested an injunction against a state judge and magistrate who they alleged had intentionally discriminated against them in setting bond and sentencing. The Court held that the complaint failed to allege a case or controversy. It refused to assume that plaintiffs would violate the law, be charged, tried, and subjected to discrimination by defendants. It emphasized that the requested injunction "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." 414 U.S. at 501.

Even if we were inclined to fan cold embers for the heat of a present case or controversy, we would be loath to award declaratory relief on the facts of this case. The Court has observed on more than one occasion that "[t]he Declaratory Judgment Act was an authorization, not a command." Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962); Eccles v. Peoples Bank, 333 U.S. 426, 431 (1948). "Especially where governmental action is involved, courts should not intervene unless the need

for equitable relief is clear, not remote or speculative." Eccles, 333 U.S. at 431. There is nothing to indicate, and we decline to presume, that Judge Herman will fail to take cognizance of applicable constitutional principles in future proceedings. Cf. Hamill v. Wright, 870 F.2d 1032, 1035-36 (5th Cir. 1989).

There is, of course, a practical effect of the panel's decision. Issuing a declaratory judgment would support an award of attorney's fees against Judge Herman under §1988. This is an "end run" around a defendant's immunity. It is appropriate that we recognize that reality in determining whether declaratory relief is warranted. See Green v. Mansour, 106 S. Ct. 423, 428 (1985); Hewitt v. Helms, 107 S. Ct. 2672, 2677 (1987). We should be hesitant to inhibit state judges from exercising the discretion that comes with their job by imposing costs solely to protect against a hypothetical risk of future harm. The practical concerns, combined with concerns of equity, comity, and federalism, tip the balance decisively in favor of restraint.

In finding that O'Hair lacks standing to obtain prospective relief, we need not embrace or disturb our decision in O'Hair v. White, 675 F.2d 680 (5th Cir. 1982) (en banc). There we found that Madalyn Murray O'Hair had standing to assert that §4 of the Texas Constitution excluded her from jury service because of her lack of religious belief. A state law that on its face arguably excluded atheists from serving on juries clearly presented an ongoing threat to Madalyn O'Hair's right not to be excluded from jury service on religious grounds. Likewise courts have held that members of racial minorities have standing to obtain prospective relief from jury selection systems that are consistently administered so as to exclude them from jury service. See, e.g., Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) (blacks had standing to obtain injunction when statistics clearly indicated that blacks were being systematically excluded in jury selection process); Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners, 622 F.2d 807 (5th Cir. 1980) (Mexican-Americans had standing to obtain prospective relief when jury commissioners systematically excluded them from grand jury service over a ten year period).

This case is of an entirely different stripe. O'Hair challenges no

Texas law or policy. The state of Texas was not even named as a defendant. O'Hair makes no showing that Judge Herman or other judges in Travis County or elsewhere in Texas deliberately apply the oath or affirmation requirement so as to exclude atheists. Instead, she objects to the specific events which led to her incarceration by a single judge whom she is unlikely to encounter again and whose administration of the oath or affirmation requirement is likely to vary in different circumstances.

The Supreme Court recently alluded to a similar situation in Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991). In holding that a defendant has standing to object to race-based exclusions of jurors through peremptory challenges, the Court noted the barriers to such suits by an excluded juror. It explained that "[u]nlike a challenge to systematic practices of the jury clerk and commissioners such as we considered in Carter, it would be difficult for an individual juror to show a likelihood that discrimination at the voir dire stage will recur." Id. at 1373 (citing Lyons). Absent evidence of some systematic practice, an excluded juror generally lacks standing to seek prospective relief, since the juror's repeated contacts are with the system itself and not any individual players within it.

The presence of the Society of Separationists in this suit does not alter our conclusion. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). The Society fails the first and the third requirements of the Hunt test.

First, it has failed to show that its members would otherwise have standing to sue in their own right. Other Society members are not aggrieved by Judge Herman's exclusion of O'Hair from a venire. The fact that they may share O'Hair's views of the oath or affirmation requirement is an insufficient predicate for the conclusion that they themselves are facing injury. Warth v. Seldin, 422 U.S. 490, 502 (1975). We cannot exercise jurisdiction

merely because O'Hair and the Society purport to represent "all individuals eligible for jury service who have deep-seated convictions against mouthing any religious dogma as a condition to jury service." See Plaintiff's Complaint at 1. In Golden v. Zwickler, supra, the Court rejected the argument that Zwickler had a right to "a general adjudication of unconstitutionality in his own interest as well as that of others who would with like anonymity practice free speech in a political environment." 394 U.S. at 110. Constitutional questions must be presented in the context of specific live grievances. Id. There is no live grievance here.

Second, it appears likely that the Society's claim would require the participation of individual members. It is often difficult for religious organizations to assert free exercise claims on behalf of their members because the religious beliefs and practices of the membership differ. See Harris v. McRae, 100 S.Ct. 2671, 2690, (1980).[3] Nothing in this record supports the notion that Society members share O'Hair's views regarding the religious nature of an affirmance. Speculation that this is so would be perverse indeed in a free exercise case. This is a fact intensive case—an episodic exchange between a single venire person and a state trial judge.

This case differs from those in which the Court has found that the presence of a class generates a continuing controversy even though the claim of the named plaintiff has become moot. See e.g., County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Sosna v. Iowa, 419 U.S. 393 (1975). Here, there is neither a certifiable class of similarly situated individuals nor a real and immediate threat to such a class. Even if there were, they would have to demonstrate that a case or controversy existed at the time the complaint was filed. Riverside, 111 S.Ct. at 1667. O'Hair and the Society filed their complaint two years after O'Hair's

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[3] The Society does not raise a free exercise claim in its own behalf. When a religious organization itself suffers an actual or threatened injury as a result of defendant's actions, it may have standing in its own right. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

encounter with Judge Herman. Any controversy had long since subsided.

Neither O'Hair nor the Society has standing to obtain declaratory relief against Judge Herman. We do not sit to review the actions of state judges in microscopic detail when there is no continuing harm and no real threat of repeated injury. Article III "forecloses the conversion of courts of the United States into judicial versions of college debating forums." Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S. Ct. 752, 759 (1982). The panel held that the claim for money damages was barred by judicial immunity. We agree.

Affirmed.

WIENER, concurring in part and dissenting in part:

Judge Goldberg's dissent eloquently and forcefully raises a number of serious problems with the doctrine of standing as currently articulated, and, perhaps more significantly, offers the Supreme Court a principled way to limit the Lyons doctrine so that justice can be done in cases like O'Hair's. Nonetheless, given that the majority, with one minor exception, accurately states and applies the standing doctrine now sanctioned by that Court, I find myself unable to join Judge Goldberg's well-crafted dissent. I therefore concur in the majority's holding that O'Hair does not have standing to procure declaratory relief against Judge Herman under Lyons and its extensive progeny because she cannot show a real and immediate threat that Judge Herman will again exclude her from jury service and jail her for refusing to "affirm." I also concur in the majority's holding that the Society lacks standing to seek prospective relief for its members as it cannot meet the first prong of the test for associational standing set forth in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

My disagreement with the majority, and thus my reason for writing separately, stems from the sweeping language, unsupported speculation, and possibly incorrect analysis, that the majority employs in concluding that the Society fails the third prong of the Hunt test. The majority seems to offer two reasons why the Society fails this prong. One is that the Society's members may differ as to the religious nature of an affirmance. If by this statement the majority means to say that the Society lacks standing because its members may have conflicting interests on the outcome of the litigation, then it needlessly decides an issue not previously addressed by this court, and, in so doing, adopts a rule that has been rejected by most circuits that have decided that issue. See National Maritime Union v. Commander, Military Sealift Command, 824 F.2d 1228, 1231-34 (D.C. Cir. 1987) (conflicting interests among members will not defeat union's standing to urge the interests of some members in litigation); Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia, 945

F.2d 1260, 1264–66 (3rd Cir. 1991); and Gillis v. U.S. Dept of Health and Human Services, 759 F.2d 565, 572–73 (6th Cir. 1985). But see Associated General Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979). Indeed, in National Maritime Union, the Circuit Court for the District of Columbia went so far as to assert that the Supreme Court itself, in UAW v. Brock, 477 U.S. 274 (1986), determined that conflicting member interests will not preclude associational standing. 824 F.2d at 1232–33.

The majority's second reason for finding that participation of the individual members of the Society is necessary appears to be that a free exercise claim, by its very nature, requires particularized information from all members. For this proposition the majority cites Harris v. McRae, 448 U.S. 297, 320–321 (1980), in which Justice Stewart, writing for the Court, determined that the Women's Division of the Board of Global Ministries of the United Methodist Church had no standing under the third Hunt prong to challenge the Hyde Amendment on behalf of its members because a free exercise claim "ordinarily requires individual participation." But this court has never interpreted McRae as precluding all free exercise claims brought by associations on behalf of their members. See, e.g., Church of Scientology v. Cazares, 638 F.2d 1272, 1276–80 (5th Cir. 1981) (distinguishing McRae and finding church to have standing under the third Hunt prong to bring a free exercise claim on behalf of its members). The critical aspect of McRae, moreover, was that the Women's Division conceded a diversity of views within its membership as to the permissibility, necessity, and advisability of abortion. In this case, by contrast, the majority presumes a diversity of views, stating that nothing in the record supports the notion that Society members share O'Hair's views regarding the religious nature of an affirmance. Does not the fact that the Society is a co-petitioner in this suit indicate that at least a substantial number of its members hold the same view of an affirmation as does O'Hair?

Furthermore, numerous cases raising issues other than free exercise make clear that the third Hunt prong does not mean that an association lacks standing if the participation of any member is necessary. See, e.g., Hospital Council of Western Pennsylvania v. Pittsburgh, 949 F.2d 83, 89 (3rd Cir. 1991) ("[A]ssociation

may assert a claim that requires participation of some members."). The third Hunt prong merely paraphrases the more elaborate discussion of individual participation in Warth v. Seldin, 422 U.S. 490 (1975). In Warth, the Court explained that "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke this court's jurisdiction." 422 U.S. at 511 (emphasis added). In this case, however, it is neither immediately apparent why the individual participation of all Society members would be required for this free exercise claim.

What really disturbs me, no less than it disturbs Judge Goldberg, is that neither O'Hair nor the Society has any way to pursue redress of the First Amendment violations perpetrated by the state trial judge in this case. My disturbance is not, I fear, shared by many of my colleagues, in most of whom I sense a degree of relief that the issue of standing pretermits the need to address Appellees' free exercise claims.

O'Hair, and likely her famous grandmother as well, must have thought that Santa Claus, the Easter bunny, and the tooth fairy had combined their efforts to deliver the jury summons that launched this case on its odyssey. I have the impression that many of my colleagues are thankful to the Supreme Court (if not to that same mythical trio) for providing the insurmountable obstacle of standing that interdicts this court's obligation to deal with the discomfiting First Amendment claims of these perennial Atheist gadflies. In that regard, however, we would all do well to heed the sagacious words of Justice Holmes:

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.

United States v. Schwimmer, 279 U.S. 644, 653 (1929). The practical effect of lack of standing, pursuant to Lyons, is the

denial of redress of the type of unconstitutional abuse visited by Judge Herman directly on O'Hair, and indirectly on the Society, as long as occurrences of that nature are anecdotal and do not rise to the frequency or consistency required to confer standing.

True, Judge Herman started down the path of propriety in his handling of O'Hair's free exercise objection to participating in an act of affirmation. In fact, the judge reached the penultimate stepping stone on that path before he deviated from the proper to the impermissible. If, instead of engaging in constitutionally repugnant debate with O'Hair about the validity of her religious beliefs vis-a-vis an affirmation, Judge Herman had calmly but firmly insisted that O'Hair propose a truth-ensuring statement that she felt she could make without violating the tenets of Atheism as she in good faith professes them, the judge would have maintained an unassailable position, doing all that the courts and the Constitution require. That is clear from the panel majority opinion and the dissenting opinion, both penned by Judge Goldberg.

Fortunately, the substance of Judge Goldberg's opinions subsists, shining as a lamp to brighten the constitutional path for the eyes of all trial judges, both state and federal, within the boundaries of this circuit whenever one of those jurists happens to encounter a prospective juror or witness who has either religious or anti-religious concerns about oaths or affirmations. Albeit today's majority opinion keeps Judge Goldberg's opinions from constituting precedent, their lesson is "out there" for all judges of good will to heed.

For the foregoing reasons I specially concur in part and dissent in part.

GOLDBERG, Circuit Judge, dissenting:

This has become a case of the tail wagging the dog.

I cannot join the majority opinion because it wags the tail while emaciating the body of the panel opinion. For the reasons expressed in the panel opinion, 939 F.2d 1207 (5th Cir. 1991), I adhere to the view that Judge Herman trespassed upon O'Hair's constitutional right to freedom of religion when he excluded her from jury service and jailed her for refusing to "affirm" without first proposing that she make a non-religious, conscious-binding declaration of a commitment to tell the truth. And because there is not only a likelihood of recurrence, but a statistical certainty that O'Hair and members of the Society of Separationists will again be summoned for jury duty before Judge Herman, I find no jurisdictional impediment to their bringing this lawsuit to challenge Judge Herman's practice.

I.

The undercurrent of the standing requirement is the notion that courts should only adjudicate those cases in which the plaintiffs have a " 'personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." City of Los Angeles v. Lyons, 103 S.Ct. 1660, 1665 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). The plaintiffs in this "case" have a personal stake in the outcome and the constitutional issues presented are razor sharp: the plaintiffs are atheists who object to the mingling of religion in governmental activities. They brought this lawsuit based upon the practice employed by Judge Herman of the Travis County Court — on more than one occasion[1] — requiring that prospective jurors make an "affirmation." Whatever one might think of the constitutionality of Judge Herman's practice, compare Society of Separationists, 939 F.2d at 1215-17 (majority opinion) with id. at 1220-24 (Gar-

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[1] See infra note 2.

wood, J., dissenting), no one should doubt that this litigation presents a case and controversy within the meaning of Article III of the Constitution.

A.

The majority's conclusion that the plaintiffs lack standing rests entirely on its application of the Supreme Court's decision in Lyons to the facts of this case. Simply put, Lyons restates the proposition, articulated by the Court in O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974), and Rizzo v. Goode, 423 U.S. 362, 372 (1976), that past exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief "[a]bsent a sufficient likelihood that he will again by [sic] wronged in a similar way. . . . " Lyons, 103 S.Ct at 1670. The majority reasons that, like the plaintiff in Lyons, O'Hair cannot show a real and immediate threat that she will again be harmed in a similar way. See maj. op. at 6.

Lyons involved a challenge to a chokehold maneuver employed by Los Angeles police officers. The Supreme Court found no standing to obtain prospective relief because the plaintiff, although injured by the chokehold in the past, could not establish a threat of a similar injury in the future. Pivotal to this conclusion was the fact that the plaintiff could not distinguish himself from any other citizen as being a future victim of the unconstitutional act. The past harm suffered by the plaintiff in that case had no bearing on the likelihood that he would again be harmed by the defendant. In other words, the plaintiff in Lyons was no more likely than the next guy to be injured again.

O'Hair and members of the Society of Separationists do not stand in the shoes of the next guy. Indeed, they are susceptible to injury precisely because they are not like the average Joe: they are not willing to conform to the popular view that an affirmation is not a religious exercise. Thus, they are the plaintiffs to bring this action for prospective relief. True, all citizens can expect to be summoned to serve their duty as jurors. But only these plaintiffs, by virtue of their distinctive views about religious activities, are threatened by Judge Herman's practice. They are uniquely vulnerable to future injury. This is not a case in which "the

asserted injury is a generalized grievance shared in substantially equal measure by all or most citizens." O'Hair v. White, 675 F.2d 680, 687 (5th Cir. 1982) (en banc). Such an injury will not suffice to confer standing upon a plaintiff. Id. (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974)). Rather, this is a case in which the threatened injury will be suffered by a limited, identifiable group of citizens — atheists and others whose religious beliefs (or lack of beliefs) cause them to be offended by the demand for an affirmation. See, e.g., Ferguson v. C.I.R., 921 F.2d 588 (5th Cir. 1991) (prospective oath-taker refused to "affirm" because she understood two passages from the Bible to prohibit affirmations).

Although no single plaintiff can predict with certainty when exactly he will be summoned to serve, we can rest assured that these plaintiffs will be summoned in due time, particularly under the random jury selection system. This fact assumes special significance because in Lyons the Court found no standing for the following reason:

> [I]t is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly or serious bodily injury.

Lyons, 103 S.Ct. at 1668. In essence, the plaintiff in Lyons was seeking redress based upon a "chain of speculative contingencies: that he would be arrested and provoke the officer to use the chokehold in an unconstitutional manner." Nelsen v. King County, 895 F.2d 1248, 1252 (9th Cir. 1990) (explaining Lyons).

Unlike Lyons, the threat of future of injury in this case does not depend on a "chain of speculative contingencies," but rather on certain probabilities beyond the plaintiffs' control. We are dealing here with jury duty, an obligation of citizenship. The plaintiffs can reasonably anticipate similar encounters with Judge Herman in the future when they are summoned to serve as jurors in Travis County. The record reflects that Judge Herman continues to

serve on the County Court, and accordingly, there is a quantifiable, mathematical certainty that he will again preside over jury impanelment and encounter O'Hair or some other member the [sic] Society of Separationists among the prospective jurors.[2] For some, the fact that the probability is quantifiable, and not "contingency riddled," would independently establish that the likelihood of recurrence is sufficient for standing purposes. "Our analysis cannot be reduced to considering probability merely in terms of quantitative percentages." Nelsen, 895 F.2d at 1250. Perhaps we should also "describe 'probability' [of future injury] qualitatively, as requiring a very significant possibility," id. (quoting Sample v. Johnson, 771 F.2d 1335,1343 (9th Cir. 1985), cert. den., 475 U.S. 1019 (1986)), or, as the Supreme Court phrased it in a post-Lyons decision, as requiring a "credible threat" of future injury. Kolender v. Lawson, 103 S.Ct. 1855, 1857 n.3 (1983). Under this qualitative analysis, the plaintiffs have standing because there is a "significant possibility" and "credible threat" that they will be summoned for jury service.

The fact that Judge Herman alone is accountable for the threat of future injury does not take the legs out from under the plaintiffs' position. Although Judge Herman was not "acting pursuant to any state or local rule or statute" when he demanded an affirmation from O'Hair, see maj. op. at 6, there is evidence in the record that he continues to engage in a similar practice: While impaneling a jury following the incident with O'Hair, Judge Herman

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[2] The majority's assertion that "Judge Herman's regular duties do not include such matters" as impaneling juries, maj. op. at 6, finds no support in the record. Indeed, there is evidence in the record that not long after he excluded Ms. O'Hair from jury service, Judge Herman was again called upon to impanel a jury. Among the prospective jurors, he encountered an individual who interposed a similar objection to the affirmation process. As with O'Hair, Judge Herman excluded that individual from jury service on that basis. See maj. op. at 4 n.1.

Of course, if there is any question about whether Judge Herman continues to impanel juries, a remand would be appropriate to allow the district court to make factual findings, rather than speculating on appeal as to the likelihood that these plaintiffs will appear before Judge Herman in the future.

demanded an "affirmation" from another atheist who was summoned for jury duty and excluded him from service without first proposing that he make a non-religious, conscience-binding declaration as an alternative to an affirmation. See supra note 2. Thus, the record reflects the genesis of a pattern[3] or "personal policy"[4] of exclusion by Judge Herman based on the juror's religious beliefs, which cannot be dismissed as merely "contextual" or "episodic." See maj. op. at 6. We need not wait until Judge Herman excludes or incarcerates others before we can evaluate the constitutionality of Judge Herman's practice and award the appropriate declaratory relief.

B.

The majority's reliance on Lyons and its progeny is misguided for yet another reason. Unlike this case, the plaintiffs' assertion of standing in those cases cited by the majority was predicated upon the contingency that the plaintiff would commit a crime that would set in motion a chain of events culminating in the defendant's unconstitutional act. There was absolutely no measure of certainty that the plaintiffs in those cases would suffer the future injury and the likelihood that they would turn in large part on events within their own control.

Our court found no standing in Adams v. McIlhany, 764 F.2d 294, 299 (5th Cir. 1985), cert. den., 474 U.S. 1101 (1986), because the recurrence depended upon the plaintiff's son committing a crime, being rearrested, charged, and sentenced before the defendant judge in order for the judge to hold the plaintiff in contempt for writing a derogatory letter about the judge. We also found no standing in Brown v. Edwards, 721 F.2d 1442, 1446-47 (5th Cir. 1984), because the plaintiff did not allege or prove that he was "in any way likely, or more likely than any other Missis-

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[3] Cf. Ikuno v. Yip, 912 F.2d 306, 309 (9th Cir. 1990) ("two acts is an accepted minimum" for establishing a "pattern" under the RICO statute) (citing H.J., Inc. v. Northwestern Bell tel. Co., 109 S.Ct. 2893, 2899 (1990)).

[4] Contra maj. op. at 6 ("It is clear that the judge was not acting pursuant to any . . . personal policy, when he failed to ask O'Hair if there were alternative ways in which she would be willing to commit herself to tell the truth.").

sippian, to be again subjected to arrest or charging by any Mississippi constable." Most recently, this circuit found no standing in Johnson v. Moore, Slip op. 3726, 3729 (5th Cir. Apr. 10, 1992), because "[i]t would require conjecture or hypothesis to find that Johnson [would] again act in such a way as to be arrested on a misdemeanor charge" and thus subject himself to the unconstitutional act of the defendant-judge.

The Tenth Circuit found no standing in Schepp v. Fremont County, 900 F.2d 1448. 1452-53 (10th Cir. 1990), for essentially the same reason: The probability of recurrence was too remote where it depended on the plaintiff violating probation so as to be subjected to probation-revocation proceedings. The Eighth and Ninth Circuits found no standing in cases brought by inmates challenging conditions of confinement in correctional institutions from which they have been transferred because there was no showing that the plaintiffs were likely to return to the institutions. Foster v. Basham, 932 F.2d 732, 734 (8th Cir. 1991); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991).

In Nelsen, another Ninth Circuit case, the court found no standing, recognizing that cases like Lyons and O'Shea turned on the fact that the plaintiff had to commit an unlawful act in order to expose himself to repeated injury. Nelsen, 895 F.2d at 1252. In Nelsen the plaintiffs challenged the constitutionality of the conditions in a drug rehabilitation center where they had been confined. Over a dissent, the panel majority concluded that standing was lacking because the plaintiffs "failed to demonstrate any . . . systematic pattern or policy that would suggest that their return to the [drug rehabilitation] [c]enter [was] inevitable." Id. at 1254.[5]

Even the Supreme Court case underpinning the Lyons decision, O'Shea v. Littleton, 414 U.S. 488 (1974), turned on a "chain

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[5] The dissenting judge believed that standing did exist because plaintiffs had tendered unrebutted evidence proving that was a 35% to 75% probability that the plaintiffs themselves would return to the facility. The dissent concluded that "appellants have established there is credible threat they will again suffer the harm they have alleged." Id. at 1255 (Pregerson, J., dissenting).

of speculative contingencies, particularly a chain that include[d] the violation of an unchallenged law." Nelsen, 895 F.2d at 1252. The Supreme Court found no standing because the plaintiffs would have had to violate the law, be charged and tried before the defendants, in order to be subjected to the unconstitutional conduct. O'Shea, 414 U.S. at 496; see also Ashcroft v. Mattis, 431 U.S. 171, 172 & n.2 (1977) (holding that the plaintiff, whose first son was killed by police while attempting to escape arrest, had no standing to obtain a declaratory judgment on the constitutionality of the state statute authorizing the use of deadly force in apprehending a fleeing felon where complaint merely alleged that plaintiff's other son might be arrested and attempt to flee).

While these cases, relied upon by the majority, distill a principle of black letter law for standing — that prospective relief is only available if there is sufficient likelihood of recurrence — they do not govern this case. Unlike Lyons, O'Shea, Ashcroft, Adams, Brown, Johnson (5th Cir.), Schepp, Foster, Johnson (9th Cir.), and Nelsen,[6] the plaintiffs in this case "do not have to induce a police encounter before the possibility of injury can occur. The [plaintiffs] are subject to constitutional injury based on completely innocent behavior. . . . " LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985) (emphasis added) (holding that the plaintiffs had standing to obtain injuction against the INS for its policy of conducting random searches and seizures of residents of migrant farm dwellings), amended, 796 F.2d 309 (9th Cir. 1986).[7] Rather,

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[6] Foster and Johnson (9th Cir.) are different because they involved inmates transferred to different penal institutions, thus mooting out any claim for prospective relief. It appears that there was no threat that they would be transferred back to the original facility. Perhaps if the plaintiffs committed an offense some time later, they might serve time in that institution. Such speculation, of course, cannot establish a "credible threat" of future injury.

[7] Moreover, this case is different because, as one legal scholar has observed, "Lyons must be understood in large part as a decision of substantive law. In particular, the case seems to represent a further extension and reification of the Court's general, sweeping respect and deference for men in uniform that has overriden a wide range of substantive law claims." Laurence H. Tribe, American Constitutional Law 122 (2d ed. 1988).

the more apposite precedents, are the ones downplayed by the majority: O'Hair v. White, 675 F.2d 680 (5th Cir. 1982) (en banc) and Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'r, 622 F.2d 807 (5th Cir. 1980), cert. den., 450 U.S. 964 (1981).

In O'Hair v. White this court concluded that the plaintiffs, Madalyn Murray-O'Hair and the Society of Separationists, had standing to challenge a Texas law that infringed upon their right not to be excluded from jury service on religious grounds. The constitutional challenge was virtually identical to the one pressed here. The plaintiffs alleged that law required that they acknowledge the existence of a supreme being. Over two dissenting opinions, a majority of the en banc court found that the plaintiffs had standing to bring the lawsuit even though the plaintiffs arguably could not demonstrate a high probability that they would be summoned for, and excluded from, jury duty. The majority wrote:

> O'Hair's final asserted basis for standing is that section 4 [of the Texas Constitution] caused her to be excluded from jury duty because she refused to swear to her belief in a supreme being. . . . O'Hair is . . . aggrieved by being excluded from jury duty because of her lack of religious belief. . . . She clearly has standing to challenge that system.

675 F.2d at 691. Contra id. at 702 (Tjoflat, J., concurring in part and dissenting in part) ("I would hold that O'Hair lacks standing to assert [her] claim [that she is excluded from jury service based on her religious beliefs] because she alleges not that she has been excluded from jury service but only that she would be"); id. at 703 (Reavley, J., dissenting) (embracing Judge Tjoflat's dissent).

In Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners this court held that Mexican-Americans had standing to obtain prospective relief from systematic exclusion from grand jury service. Concluding that "O'Shea [did] not control the disposition of these cases," we explained that:

> Under these allegations, the threat of future injury is pal-

> pable. Unlike the contingency riddled complaint of O'Shea, the complainants here claim an injury that turns on a single contingency that the jury commissioners will act exactly as they have for the past ten years . . . Unlike O'Shea . . . [plaintiffs'] injury here depends solely upon the actions of the [defendants].

622 F.2d at 820–21; see also Carter v. Jury Commission of Greene County, 90 S.Ct. 518, 523 (1970) ("Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here.").

Both O'Hair v. White and Ciudadanos compel a conclusion that the plaintiffs in this case have standing.[8] O'Hair and members of the Society of Separationists are just as threatened by exclusion from jury service as the plaintiffs in those cases. The majority's effort to distinguish those cases as involving either a "state law that on its face arguably excluded atheists from serving on juries" or "jury selection systems that [were] consistently administered so as to exclude [minorities] from jury service" is unpersuasive. See maj. op. at 10. Standing to obtain equitable relief in any case depends on the threat of future injury — in this case, as in O'Hair v. White, the threat that the plaintiffs will be excluded from jury service because of their views on religion. In O'Hair v. White and Ciudadanos this court was necessarily satisfied that this threat of future was sufficient to establish the plaintiffs' standing to seek prospective relief. Surely the threat of future injury to any one plaintiff in O'Hair v. White and Ciudadanos was no more "credible," "distinct," "palpable," "real," or "immediate" than the threat of future injury plaguing the plaintiffs in this case. O'Hair and other members of the Society of Sep-

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[8] Lyons represented an application, not an extension, of O'Shea. Lyons, 103 S.Ct. at 1667 ("No extension of O'Shea . . . is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought."). Thus, Ciudadanos and O'Hair v. White, both of which found that the plaintiffs had standing, were not undercut by the Supreme Court's subsequent decision in Lyons.

arationists have standing to obtain equitable relief.[9]

II.

From this conclusion, it follows that the Society of Separationists itself has the requisite "associational standing" to bring this lawsuit. See maj. op. at 11 (applying the three prong test articulated in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). I need not comment at length to make this point. I have explained why I believe that O'Hair and other members of the association have demonstrated a sufficient threat of future injury to establish that they have standing in their own right to challenge Judge Herman's practice.[10] That satisfies the first prong of the Hunt test. The majority does not dispute that the "interests [that the Society of Separationists] seeks to protect are germane to the organization's purpose." Hunt, 432 U.S. at 343.

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[9] The majority's citation (maj. op. at 11) to Powers v. Ohio, 111 S.Ct. 1364, 1373 (1991), is misplaced. The Powers Court merely observed that a juror could not "easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges." Such would be the case because the use of a peremptory strike depends so much on the subject matter of the underlying prosecution. The threat of future injury would be particularly remote and turn on a "chain of speculative contingencies."

[10] Because the Society represents the interests of similarly situated plaintiffs, it would be fitting, in my view, to aggregate the probabilities of future injury to determine whether the Society has standing to bring suit on behalf of its members. Contrast Asarco Inc. v. Kadish, 109 S.Ct. 2037, 2044 (1989) ("[T]he doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves."). By this I mean that under the first prong of Hunt -- which asks whether the association's "members would otherwise have standing to sue in their own right," 432 U.S. at 343 -- the likelihood of future injury should be measured by the probability that any one member of the associational plaintiff would be injured, rather than the probability that a particular member of the associational plaintiff might be injured. I believe that aggregating the probabilities is appropriate in a case like this one, which does not involve a generalized grievance and implicates both Lyons and Hunt, because it more accurately reflects the reality, immediacy, and palpability of the threatened injury to the associational plaintiff and its membership.

So much for the second prong.

As for the third prong, the majority suggests that "the Society's claim would require the participation of individual members . . . [because] Society members' views [may] differ as to the religious nature of an affirmance." Maj. op. at 12. Even if that bit of speculation were accurate — that members of the Society take differing positions on affirmations — associational standing does not require harmony of member interests. See Contractors Ass'n. v. Philadelphia, 945 F.2d 1260, 1266 (3d Cir. 1991) (finding litigation not contrary to interests of a majority of members); National Maritime Union v. Commander, Military Sealift Command, 824 F.2d 1228, 1231-34 (D.C. Cir. 1987); Gillis v. U.S. Dept. of Health & Human Servs., 759 F.2d 565, 572-73 (6th Cir. 1985). Contra Associated Gen. Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979) (rejecting associational standing when factual or potential conflicts exist among members). See generally UAW v. Brock, 106 S.Ct. 2523, 2532-33 (1986) (declining to "reject the principles of associational standing," notwithstanding argument that associations "will not always be able to represent adequately the interests of their injured members.").

It is also quite plain that in this challenge to Judge Herman's practice of demanding an affirmation as a condition of jury service, the individual plaintiffs are not "indispensable to proper resolution of the cause. . . ." Warth v. Seldin, 422 U.S. 490, 511 (1975). The plaintiffs merely seek a declaration that Judge Herman may not exclude or incarcerate a prospective juror for refusing to affirm until he has proposed that the prospective juror make a nonreligious, concience-binding declaration of a commitment to tell the truth. "[T]he claim asserted and the relief requested affect the membership as a whole" and therefore, "the claim does not require individualized participation." Church of Scientology v. Cazares, 638 F.2d 1272, 1276-80 (5th Cir. 1981) (association had standing to bring free exercise challenge on behalf of its members).

At least twice since Hunt, this court has held that the Society had standing to raise constitutional claims on behalf of its members. See O'Hair v. White, 675 F.2d at 691-92 (holding that the Society satisfied the requirements of Hunt and thus had stand-

ing to litigate alleged violations of its members voting rights); Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) ("because Murray has standing, the Society, of which he is a member, also has standing" to litigate the constitutionality of the inclusion of a religious symbol in a city insignia). As in those two cases, I would find that the three-prong Hunt test poses no obstacle to the Society's associational standing in this case.

III.

This is a case about the First Amendment, the cornerstone of all other rights and freedoms which we, as citizens of this great Nation, have come to enjoy, and perhaps even take for granted. It is very disturbing to think that we would contort the doctrine of standing and employ it as an evasive device for dodging sensitive constitutional questions, especially when First Amendment rights are at stake. Accord maj. op. at 7 ("We must not shrink from our duty to decide a controversy . . . . "). Not surprisingly, courts have consistently applied the standing doctrine liberally, not grudgingly, in the context of First Amendment litigation.[11]

Standing is not a static concept. Rather, it is an evolutionary doctrine that continues to mature. Although the doctrine appropriately restricts the flood of noxious litigation, we must insure that it does not narrow the avenue for raising concrete constitutional claims. I cannot believe that the Framers would say that a federal court lacks jurisdiction to hear a case brought by

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[11] Cf. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 380 n.5 (1985) (citing "the numerous cases in which [the Supreme Court has] adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools"); Flast v. Cohen, 392 U.S. 83 (1968) (Establishment Clause challenge to federal aid-to-education program based upon federal taxpayer standing); Everson v. Board of Education, 330 U.S. 1 (1947) (local taxpayer standing to raise Establishment Clause challenge to school district expenditures); Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) (concluding that the Society of Separationists and its member had standing to raise Establishment Clause challenge to inclusion of religious symbol in city insignia); see generally Tribe, supra note 3, at 116 ("The Court has been particularly generous in entertaining challenges under the establishment clause of the first amendment to state or local aid to church-related schools.").

a citizen who has been jailed for her refusal to participate in a religious exercise in connection with the performance of a civic duty when that citizen can expect to be summoned again. This court has historically opened its ears and hearts to the wailing cries of those deprived of treasured rights. I would hold that these plaintiffs have standing to raise their claims, and in so doing, preserve the reputation of this court as an open, not a closed, circuit.

I respectfully, but fervently, dissent.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8660

SOCIETY OF SEPARATIONISTS, INC., ET AL

Plaintiffs-Appellants,

versus

GUY HERMAN, Judge of the Travis County Court at Law, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(November 1, 1991)

Before CLARK, Chief Judge, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, and E. GARZA, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Appendix C

SOCIETY OF SEPARATIONISTS, INC.,
et al., Plaintiffs-Appellants,

v.

Guy HERMAN, Judge of the Travis
County Court at Law, et al.,
Defendants-Appellees.

No. 90-8660.
United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1991.

Prospective juror who had been imprisoned for contempt when she refused to swear or affirm to tell the truth brought civil rights action against judge and others. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed, and prospective juror appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) action was not barred by res judicata; (2) decision in prior case brought by juror against state court was not stare decisis; (3) judge was entitled to absolute or qualified immunity from damages; but (4) judge's attempt to coerce prospective juror to make an affirmation despite her sincere religious objections was a violation of the free exercise clause.

Affirmed in part and remanded in part.

Garwood, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, and GOLDBERG and GARWOOD, Circuit Judges.

GOLDBERG, Circuit Judge:

An atheist, summoned for jury duty in a Texas court, declined to take the required pre-voir dire oath because it included a reference to God. Offered an affirmation containing a reference to God, she continued to refuse. When she was offered the opportunity to raise her hand and be affirmed without such reference, she still declined, explaining that she considered an affirmation just as religious as an oath. The judge disagreed with her belief that such an affirmation was religious, and jailed her for contempt. Released after posting bond, the woman sued under section 1983, alleging violation of the Free Exercise Clause, and seeking damages and injunctive and declaratory relief.

We hold that the judge's actions violated the potential juror's right to Free Exercise guaranteed by the First and Fourteenth Amendments. We grant a declaratory judgment requiring a judge confronted with a similar refusal to either dismiss the potential juror without penalty or accommodate such juror's constitutionally protected beliefs by allowing the use of an alternative form of avowal that both satisfies the scruples of the juror and the requirements of the judicial system. We also consider matters of stare decisis, claim and issue preclusion, standing, and immunity.

I. Background

On December 15, 1987, Robin Murray-O'Hair, an American Atheist, appeared for jury duty at the Travis County Courthouse, located in Austin, Texas. She refused to take the oath required of venire members before voir dire questioning, stating that she was an atheist and could not take an oath which included a reference to God. The presiding judge, Guy Herman, offered to allow Murray-O'Hair to affirm, but the affirmation still included a reference to God, and Murray-O'Hair refused. Murray-O'Hair was told to be seated and the other jurors were sworn in.

Murray-O'Hair was told to proceed to Herman's regular courtroom, where the judge again requested that she take the oath. Now accompanied by her attorney, Murray-O'Hair restated her

objections and Herman offered to allow her to raise her hand and make an affirmation without any reference to "God or anything of that nature." Murray-O'Hair declined, stating that she could not affirm because an affirmation "is just as religious as an oath." Herman warned her that if she refused to take an oath or make an affirmation, he would hold her in civil contempt. Murray-O'Hair responded that she was not trying to evade her jury duty, but sought to avoid "participating in a religious statement." The judge never inquired as to what form of assurance of truthfulness would meet Murray-O'Hair's objections. Herman and Murray-O'Hair then debated the nature of affirmations. Herman had done some legal research, based in part on cases that Murray-O'Hair had submitted to him, and he concluded that "affirmances are for atheists and other folks that do not wish to take oaths." In his view, an affirmation was not a "religious statement"; it was merely a pledge that one would give true answers to the voir dire questions and met the qualifications for jury service. Murray-O'Hair had a different view: "An affirmation, my understanding, is a religious statement." Herman responded, "The Court does not agree with you on that matter."

Murray-O'Hair continued to refuse and, ending the heretofore patient discussion, Herman ordered her jailed on the spot for a term of three days "and thereafter until you purge yourself of the contempt by taking the affirmation." She was jailed, but was released on bond approximately six hours later. She did not, or was not permitted to, resume her place in the jury pool.

Murray-O'Hair subsequently filed three separate law suits challenging Herman's actions and similar actions by other Travis County judges. First, Murray-O'Hair petitioned the Travis County district court for a writ of habeas corpus. The court denied relief, but Judge Herman subsequently commuted the contempt sentence to the six hours served. Murray-O'Hair appealed the denial of relief, but the state court of appeals dismissed the appeal as moot.[1]

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[1] See In re O'Hair, No. 3-88-044-CV (Tex.Ct.App. — Austin April 6, 1988) (unpublished opinion).

Second, on August 11, 1987, Murray-O'Hair and other individual plaintiffs brought suit in federal district court against the Travis County District Court and the Texas Attorney General, alleging a continuing pattern "whereby they (1) respond as requested for jury service in the Travis County District Court, (2) refuse to take a 'God' oath, and (3) are excluded by the presiding Judge from jury service."[2] The district court dismissed for failure to state a claim. We affirmed, holding that there is no constitutionally protected right to serve on a jury and adding that "[m]oreover, . . . jurors are not required to swear an oath to a deity . . . an affirmation [is not] the same as an oath to a deity."[3] Neither opinion fleshes out the factual context of the plaintiffs' claims; the district court simply notes that "[t]he manner of excluding the Plaintiffs from jury service varies from incident to incident," adding without explanation that "the differences are not material."[4] Neither opinion mentions Judge Herman or refers to anyone being jailed for their refusal to swear or affirm.

Third, on November 16, 1989, Murray-O'Hair and the Society of Separationists filed this section 1983 action seeking damages and declaratory and injunctive relief against Herman, Travis County Judge Bill Aleshire, Travis County, the "Travis County court system," and the clerk, sheriff and court bailiffs of Travis County. The suit, predicated on the particular exchange between Herman and Murray-O'Hair, was styled as a class action on behalf of all individuals whose religious convictions precluded them from taking the juror oath.[5] Plaintiffs claimed that Murray-O'Hair's First and Fourteenth Amendment rights had been vio-

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[2] Murray v. Travis County Dist. Court, No. A-89-CA-1463 (W.D.Tex. Mar. 22, 1989) (unpublished opinion).

[3] Murray v. Travis County Dist. Court, 898 F.2d 150 (5th Cir.) (unpublished opinion), cert. denied, — U.S. — , 111 S.Ct. 75, 112 L.Ed.2d 49 (1990).

[4] Murray v. Travis County Dist. Court, No. A-89-CA-1463 (W.D.Tex. Mar. 22, 1989) (unpublished opinion).

[5] The class is fancifully denominated as "all individuals eligible for jury service who have deep-seated convictions against mouthing any religious dogma as a condition to jury service, much less judge-dictated religious statements constituting a religious exercise."

lated because she was imprisoned for refusing to take a religious oath.

The district court decided the case on cross motions for summary judgment and on consideration of undisputed facts. The court dismissed the Society as a plaintiff and denied class certification; found that all defendants were either immune, were nonexistent entities, or were otherwise improperly named; held that the Murray decision was res judicata; dismissed plaintiffs' pendant state claims without prejudice; and imposed Rule 11 sanctions. The court later struck the award of sanctions when the defendants failed to timely submit their request for attorney's fee. The plaintiffs appealed the remaining portions of the court's order.

We hold that the previous suit does not bar this action; reinstate the Society as a plaintiff; affirm the dismissal of the defendants other than Herman; hold that Herman did violate Murray-O'Hair's Free Exercise rights; find Herman absolutely or qualifiedly immune from suit for damages; grant declaratory relief; and decline to grant an injunction.

II. Discussion

A. Stare Decisis and Preclusion

The government argues, and the district court held, that Murray-O'Hair's constitutional claim is barred by the res judicata effect of the earlier Murray decision. We disagree. We analyze the relation between Murray and the instant case according to principles not just of res judicata, but also stare decisis, collateral estoppel, and law of the case. From any of these perspectives, however, Murray is without preclusive effect.

As an initial matter, we set out our rules on stare decisis, specifically, the law on the binding effect of prior panel decisions. In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court.[6] Where two previous holdings or lines of precedent con-

flict, "the earlier opinion controls and is the binding precedent in the circuit."[7] Even a decision not necessary to support the ultimate ruling, such as an alternative holding, is binding.[8] Dicta, however, is persuasive authority only, and is not binding.[9]

In the earlier Murray case, Murray-O'Hair and other plaintiffs argued that they had a right to serve on juries, and that they were subjected to a continuing pattern of exclusion in violation of their rights; as the district court framed the question, "Does the practice of a State trial court in excluding from jury service persons who refuse to make an oath deny a vested interest . . . [or] violate the Constitutional provision of separation of church and state?"[10] The district court found no violation, holding without citation of authority that "Plaintiffs have no Constitutionally protected interest in sitting on a jury" and that "[a] jury oath which refers to a deity does not violate" the Establishment Clause; the court analyzed the juror oath using the Lemon test factors (purpose, effect, and entanglement).[11] We affirmed in an unpublished decision, holding without citation that:

> [T]he district court dismissed the case because the plaintiffs failed to state a claim upon which relief can be

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[6] Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir.1991); Umphlet v. Connick, 815 F.2d 1061, 1063 (5th Cir.1987). An exception, not relevant here, is that "a motions panel decision is not binding precedent." Northshore Dev. v. Lee, 835 F.2d 580, 583 (5th Cir.1988).

[7] Boyd v. Puckett, 905 F.2d 895, 897 (5th Cir.1990) (citing Alcorn County v. United States Interstate Supplies, 731 F.2d 1160, 1166 (5th Cir.1984)), cert. den., — U.S. —, 111 S.Ct. 526, 112 L.Ed.2d 537; United States v. Gray, 751 F.2d 733, 735 (5th Cir.1985). However, the rule is not always formulated in such absolute terms. See Alcorn, 731 F.2d at 1166 (emphasis added) (earlier line of cases is "presumptively correct"; preference for the older authority is "clearly appropriate . . . where [it] has been repeatedly acknowledged as the law of this circuit").

[8] Pruitt, 932 F.2d at 465.

[9] O'Dell v. North River Ins. Co., 614 F.Supp. 1556, 1559 (D.La.1985).

[10] Murray v. Travis County Dist. Court, No. A-89-CA-1463 (W.D.Tex. Mar 22, 1989) (unpublished opinion).

[11] Id.

> granted. Specifically, the district court determined that because the right to serve on a jury is not a constitutionally protected one, the plaintiffs' cause of action had failed to state a claim. We agree. The occasion to serve on a jury is undeniably a duty, a privilege and an opportunity for many citizens to actively and personally serve their government. Indeed, the opportunity for many citizens to serve on a jury might be the only opportunity they have to serve their government. Even so, jury service has not been construed as a constitutionally protected right.
>
> Moreover, as the plaintiffs concede, jurors are not required to swear an oath to a deity; rather, jurors are free to simply make an affirmation that the testimony which they are about to present will be the truth. An affirmation is no more than a solemn declaration made under the penalties of perjury. We do not consider, as plaintiffs would have us do, an affirmation to be the same as an oath to a deity.[12]

Thus, the "Moreover" language in Murray suggests that, for Establishment Clause purposes, an affirmation is not to be considered to have a religious nature and its use in the courtroom therefore constitutes no violation of that clause.

A year later, in Ferguson v. Commissioner, 921 F.2d 588 (5th Cir.1991), we held that the tax court violated the Free Exercise Clause, and improperly construed Fed.R.Evid. 603, by requiring a witness to take an oath or affirmation, where the witness felt that an affirmation had a religious nature inconsistent with her own faith. We explained that "the protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth."[13] That is, the plaintiff's sincere belief that an affirmation has a religious nature is sufficient to implicate free

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[12] Murray v. Travis County Dist. Court, 898 F.2d 150 (5th Cir.) (unpublished opinion), cert. den., — U.S. —, 111 S.Ct. 75, 112 L.Ed.2d 49 (1990).

[13] Id. at 589.

exercise concerns.[14] Ferguson's discussion is plenary and replete with citations.

In light of the law on prior panel decisions, we must decide whether Murray's comment on the jury oath casts doubt on Ferguson or otherwise serves as binding precedent in the instant case. We hold that it does not. For one thing, this language, bare of citation and argument,[15] is of no decisional value;[16] it is simply obiter dicta.

More significantly, Murray was an Establishment Clause case; our case, and Ferguson, are Free Exercise challenges. The two kinds of cases are governed by altogether different legal standard.[17] Even the question of the religious nature of an affirmation is distinct under these two clauses; as Murray and Ferguson suggest, our inquiry in Establishment Clause cases is whether a "reasonable observer" might construe the affirmation as religious,[18] whereas the Free Exercise query is whether this particular plaintiff holds a sincere belief that the affirmation is religious.[19] These inquiries are distinct, as the Free Exercise Clause protects even an unreasonable belief that an affirmation is religious, so long as the belief is not "so bizarre, so clearly nonreligious in motiva-

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[14] Id.

[15] The obliqueness of this language is highlighted by an inconsistency between the district and appellate decisions: the former refers to the jury oaths as including a reference to God, while the latter refers to affirmations without such references.

[16] Indeed, since the Murray decision is unpublished, the entire opinion is considered to have "no precedential value," although it is "precedent." 5th Cir.R. 47.5.1, 47.5.3.

[17] Compare Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) and County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 3100, 3101, 3119, 3124, 106 L.Ed.2d 472 (1989) (Establishment Clause) with Employment Div. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876 (1990) (citing cases) (Free Exercise).

[18] See Allegheny, 109 S.Ct. at 3115, 3123, 3127 (reasonable observer test).

[19] Ferguson, 921 F.2d at 589.

tion."[20] Accordingly, Ferguson is the applicable precedent.

As to claim preclusion (res judicata), our rule is that the earlier suit is res judicata, if, inter alia, "the parties [are] identical in both suits."[21] This condition is not met here: Herman was not a defendant in the first suit,[22] nor was he in privity with one: the

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[20] Thomas v. Review Bd., 450 U.S. 707, 714–15, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); Ferguson, 921 F.2d at 589 (citations omitted) ("The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth").

[21] Nilsen v. Moss Point, 701 F.2d 556, 559 (5th Cir.1983) (en banc) (citation and quotation omitted); see also Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 539 (5th Cir.1990) (quoting Nilsen). The other requisites are that the same cause of action was involved in both cases, the prior judgment was rendered by a court of competent jurisdiction and that it was a final judgment on the merits. Nilsen, 701 F.2d at 559.

[22] The Murray defendants were the Travis County District Court and the Texas Attorney General, Jim Mattox.

It is not at all clear that the "Travis County District Court" is a legal entity. For one thing, there are five separate district courts in Travis County. See Tex.Gov't.Code Ann. §§24.155, .200, .228, .248, .264 (Vernon 1988). None appear to be called "the Travis County District Court"; rather, they are denominated as, for example, the "53rd District Court."

Further, it seems unlikely that the concept of a single entity encompassing the various district courts of a county is not consistent with Texas law. Considering an analogous question in the case before us, the court below found that defendant "Travis County Court System" was not a "legal entit[y]." This finding was based on an affidavit from Judge Michael Schless, Local Administrative Judge of the Travis County Courts at Law, who explains:

> There is no entity known as the Travis County Court System. There are six County Courts at Law in Travis County, numbered 1, 2, 3, 5, 6, and 7. Each is an individual autonomous entity and the judge of each is a separately elected public official. Each judge is authorized by law to sit for the other and the courts are linked administratively by a scheme spelled out in the Government Code.
>
> Effective October 1, 1987, County Court at Law, No. 4 was redesignated Probate Court, No. 1 and Judge Guy Herman became the

institutional defendant in the first case was the Travis County District Court, but Herman serves on the Travis County Probate Court, which is a redesignated Travis County Court at Law. The Probate Court and the County Courts at law are altogether separate courts from the District Courts.[23] Hence, Murray is not res judicata.

As to issue preclusion (collateral estoppel), we note that "for a prior judgment to have preclusive effect as to a particular issue, the doctrine of collateral estoppel requires that: (1) the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action."[24] None of these conditions are met here: as discussed above, a Free Exercise claim is altogether different from an Establishment Clause claim, and Murray's discussion of the jury oath is not a "critical and necessary part" of the decision.[25]

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judge of that Court. None of the events described in Plaintiffs Original Complaint preceded this statutory change and, therefore, none of those events involved any judge of any County Court at Law in Travis County.

The district courts appear to be similarly independent of each other. See Tex.Gov't.Code Ann. §§24.001-.021 (Vernon 1988 & Supp.1991).

In addition, from the record before us, we have no indication that the "Travis County District Court" participated in the Murray suit. We know only that the motion to dismiss was filed by the other defendant, the Texas Attorney General.

[23] Compare Tex.Gov't.Code Ann. §§24.007, .008, .155, .200, .228, .248, .264 (Vernon 1988 & Supp.1991) (describing district courts in general and Travis County District Courts in particular) with id. at §§25.0003, .0021, .2291, .2292 (Probate Court and County Courts at Law).

[24] Meza v. General Battery, 908 F.2d 1262, 1273 (5th Cir.1990) (citations omitted).

[25] Cf. Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168-73 (5th Cir. Unit A 1981) (unappealed alternate grounds of decision do not have offensive collateral estoppel effect; rejecting in part the "alternative ground" rule that "if a court decides a case on two grounds, each is a good estoppel," and adopting position of Restatement of Judgments). See generally Restatement (Second) of Judgments §27 & comment h; C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction §4421, at 206-08 (1981 & Supp.1991).

Further, the Murray district court's reduction of the facts to a skeletal "fact pattern,"[26] coupled with the differences in parties and causes of action, makes evident that the "issue" here is a pure question of law, not one of fact or of rights between parties. In this circuit, pure questions of law are subject to collateral estoppel, but only where there is no "change in controlling legal principles between the two decisions."[27] Here, if Ferguson and Murray are considered to be in conflict, then Ferguson represents a drastic change in applicable law. Accordingly, Murray does not provide a basis for collateral estoppel of Murray-O'Hair's claims.

Finally, for the sake of completeness, we mention law of the case. This doctrine is applicable only "during the pendency of . . . a single proceeding, and operates to foreclose re-examination of decided issues either on remand or on a subsequent appeal."[28] Murray and the case before us are altogether separate proceedings, so law of the case is inapplicable.[29]

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[26] See supra sec. I.

[27] Hicks, 662 F.2d at 1167; see also Restatement (Second) of Judgments §28(2)(b). See generally id. comment c; C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction §4425, at 242-55 & n. 1 (1981 & Supp.1991).

[28] Pegues v. Morehouse Parish School Bd., 706 F.2d 735, 738 (5th Cir.1983) (emphasis added; quotations and citations omitted); Schexnider v. McDermott Int'l., Inc., 868 F.2d 717, 718 (5th Cir.1989) (emphasis added) ("The decision of a legal issue by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels" subject to certain exceptions), cert. den., — U.S. — , 110 S.Ct. 150, 107 L.Ed.2d 108.

[29] In addition, we provide an exception to law of the case where "the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Gates v. Shell Offshore, Inc., 881 F.2d 215, 217 (5th Cir.1989), cert. den., — U.S. — , 110 S.Ct. 1320, 108 L.Ed.2d 495. Ferguson would trigger this exception, since it is contrary to the Murray dicta.

B. Parties

i. Plaintiffs

The district court dismissed the Society as a plaintiff because the Society failed to satisfy the prerequisites of a class action suit as enumerated in Fed.R.Civ.P.23. In so doing, the court improperly conflated the concepts of class certification and associational standing. In O'Hair v. White, 675 F.2d 680, 691-92 (Former 5th Cir. 1982) (en banc), we held that Society was a proper plaintiff because it was an organization suing on behalf of its members with respect to the deprivation of their voting rights under Texas law. For the same reasons set out in that opinion, we conclude that the Society has associational standing to assert the rights of its members not to be imprisoned for refusing what is in their eyes a religious affirmation.

An altogether separate question is whether the district court ought to have certified this suit as a class action. In dismissing the Society as a plaintiff, it implicitly declined to do so. The plaintiffs have not pressed an appeal on this issue, and we see no need to rule on the matter.

ii. Defendants

The district court found that all defendants other than Herman were either immune,[30] were nonexistent entities, or were otherwise improperly named. We agree, and affirm sections IV, VI, VII, and IX of the court's opinion for the reasons stated therein.[31]

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[30] The district court also found that Judge Herman was immune. We agree, and discuss this matter infra sec. II.D.i.

[31] With respect to defendant Travis County, we add that the County cannot be susceptible to liability under §1983, because Judge Herman's actions effectuated a policy of the State of Texas, not Travis County. See Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (county not liable for actions of Texas county judge that effectuate state rather than county policy; state statutes embody state, not county, policy); Tex.Code Crim.Proc.Ann. art. 35.02 (prescribing oath); Tex.R.Civ.P. 226 (same).

C. Constitutional Claim

Religious freedom is a primal guarantee of our Constitution, and any government action that compels the expression of religious adherence is suspect. Such religious involvement by government is almost unqualifiedly prohibited.

We begin our analysis of this issue with the familiar proposition that "no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[32] Our Constitution protects not just the right to speak, but the right to "refrain from speaking . . . the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[33] These principles, although bottomed on the First Amendment's Free Speech Clause, developed in response to religiously-motivated objections to coerced speech.[34] Not surprisingly, the Supreme Court has found the same principle embodied in the Free Exercise Clause: "The Free Exercise Clause . . . means . . . [that the] government may not compel affirmation of religious belief."[35]

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[32] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

[33] Wooley v. Maynard, 430 U.S. 705, 714, 715, 97 S.Ct. 1428, 1435, 1435, 51 L.Ed.2d 752 (1977).

[34] See Barnette, 319 U.S. at 629, 63 S.Ct. at 1181 (Jehovah's Witnesses objecting on religious grounds to requirement that their children salute the flag in public school); Wooley, 430 U.S. at 707, 713, 97 S.Ct. at 1431, 1434 (Jehovah's Witnesses objecting on religious grounds to required display of phrase "Live Free or Die" on New Hampshire license plate); Bowen v. Roy, 476 U.S. 693, 704-05, 106 S.Ct. 2147, 2154-55, 90 L.Ed.2d 735 (1986) (citing Barnette) ("In cases upholding First Amendment challenges . . . the Court has often relied on the showing that compulsion of certain activity with religious significance was involved"); Employment Div. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 1601, 108 L.Ed.2d 876 (1990) (Wooley and Barnette, although "decided exclusively upon free speech grounds, . . . also involved freedom of religion").

[35] Smith, 110 S.Ct. at 1599 (citing Torcaso v. Watkins, 367 U.S. 488, 493, 495, 81 S.Ct. 1680, 1682, 1683, 6 L.Ed.2d 982 (1961) (quotations omitted) ("neither a State nor the Federal Government can constitutionally force a person to

The Free Exercise Clause extends its protection to "all sincere religious beliefs";[36] it is of no moment that a belief might not be "acceptable, logical, consistent, or comprehensible to others."[37] Accordingly, we have little trouble concluding that Judge Herman's attempt to coerce Murray-O'Hair to take an affirmation, despite her sincere religious objections, was a violation of the Free Exercise Clause.[38]

It is true that Free Exercise jurisprudence admits an exception for claims "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[39] But Murray-O'Hair's claim — that a God-free affirmation is nonetheless a "religious statement," hence objectionable — is not this far-fetched. The fact that she is not alone in her views on affirmations[40] is evidence of this,[41] as are statutory references that merge the concepts of oath and affirmations.[42] Law dictionaries too define affirmation interchangeably with oath: both Black's

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profess a belief or disbelief in any religion") (quoting Everson v. Board of Educ., 330 U.S. 1, 15-16, 67 S.Ct. 504, 91 L.Ed. 711 (1947)). See also Sherbert v. Verner, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963) (citing Torcaso) (Free Exercise Clause does not allow government to "compel affirmation of a repugnant belief").

36 Ferguson, 921 F.2d at 589.

37 Thomas, 450 U.S. at 714, 101 S.Ct. at 1430.

38 Cf. Moore v. United States, 348 U.S. 966, 71 S.Ct. 530, 99 L.Ed. 753 (1955) (court erred in refusing to accommodate religious objection to use of the word "solemnly" in affirmation; "[t]here is no requirement that the word solemnly be used in the affirmation"), rev'g 217 F.2d 428, 430-31 (1954).

39 Thomas, 450 U.S. at 715, 101 S.Ct. at 1430.

40 See Ferguson, 921 F.2d at 588 ("swear" and "affirm" both repugnant to witness for religious reasons); Gordon v. Idaho, 778 F.2d 1397, 1399-400 (9th Cir. 1985) (same); cf. Moore, 217 F.2d at 430-31 (member of the Harshmanite church declined due to religious scruples to use the word "solemnly" in affirmation).

41 See United States v. Lee, 455 U.S. 252, 257 n. 6, 102 S.Ct. 1051, 1055 n. 6, 71 L.Ed.2d 127 (1982) (Burger, J.) (Amish objection to Social Security program and payroll taxes could not be held bizarre in light of similar challenge from member of Sai Baba faith).

42 See Tex.Penal Code Ann. §1.07(a)(22) (definitions) (" 'Oath' includes affirmation"); 1 U.S.C. §1 (same).

and Bouvier's provide one definition of the term as a "solemn religious asseveration in the nature of an oath."[43] While the religious connotations of an oath probably seem stronger to most observers, that is not license to dismiss Murray-O'Hair's view of affirmations as unentitled to Free Exercise protection; to her and others, affirmation has become a surrogate word that is suspect because of its traditional association with religion. As Murray-O'Hair's claim is not "bizarre [or] clearly non-religious in motivation," we conclude that it is entitled to the protection of the Free Exercise Clause.

Nor can Murray-O'Hair's objections be dismissed as trivial, in the way that one might dismiss a Free Exercise challenge to the presence of "In God We Trust" on U.S. coins and bills. An affirmation is a public attestation, "readily associated with" the speaker, whereas "currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto."[44] Moreover, an affirmation requires that the speaker herself actually utter the words she finds objectionable, while the motto on currency coerces neither audible speech nor visible display. A speaker's voice and mannerisms are personal to her, while currency is utterly fungible. The personal, public, and active nature of a coerced affirmation renders it far from trivial, and readily distinguishable from a greenback aphorism.

Our holding in this case is consistent with a recent Supreme

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[43] Black's Law Dictionary 29 (abr. 5th ed. 1983) (emphasis added). See also Black's Law Dictionary (definition of affirmation) (6th ed.) (available on Westlaw); 1 Bouvier's Law Dictionary 160 (1914).

We note in passing that other sources define the word without reference to religion. See 67 C.J.S. Oaths & Affirmations §2, at 6; Webster's Third New International Dictionary 35 (unabridged ed. 1967); Webster's Ninth New Collegiate Dictionary 61 (1990); I Oxford English Dictionary 40 (compact ed. 1971); American Heritage Dictionary of the English Language 22 (New College ed. 1976); 1 Encyc. Brit. 233 (1965); 16 Encyc. Brit. 815–16 (1965).

[44] See Wooley, 430 U.S. at 717 n. 15, 97 S.Ct. at 1436 n. 15 (distinguishing coerced public speech — requirement that license plate bear state motto "Live Free or Die" — from use of currency bearing motto 'In God We Trust' ").

Court case on the Free Exercise Clause, Employment Div. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In Smith, the Court rejected a Native American's religious objection to a law criminalizing peyote use, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[45] However, the Court reaffirmed the principle that "[t]he government may not compel affirmation of religious belief" and observed that "we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action [in cases involving] the Free Exercise Clause in conjunction with other guarantees, such as freedom of speech."[46] Thus, Smith specifically excepts religion-plus-speech cases from the sweep of its holding.

Notwithstanding the broad language of the Supreme Court's pre-Smith precedent, it might be argued that some limits are necessary, even in religion-plus-speech cases, in order to ensure that accommodating the individual's religious belief does not "radically restrict the operating latitude" of the government.[47] Whether such a restriction is required as a matter of precedent is a matter we do not decide.[48] Nonetheless, we willingly set such a limit in the instant case, because it is clear, for example, than an outright refusal to make some kind of pledge[49] would frustrate the operation of the judicial system. In any event, Murray-O'Hair did not

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[45] Id. 110 S.Ct. at 1600 (citing Lee, 455 U.S. at 263 n. 3, 102 S.Ct. at 1054 n. 3 (Stevens, J., concurring in the judgment)).

[46] Id. 110 S.Ct. at 1599, 1601.

[47] Lee, 455 U.S. at 259, 102 S.Ct. at 1056 (quotations omitted).

[48] Lee involved the Social Security tax laws, not a restriction on speech. See id. at 254, 102 S.Ct. at 1053.

[49] Or oath, affirmation, promise, vow, adjuration, asseveration, avowal, declaration, or commitment. In such matters, some judicial systems apparently have a flexibility quite literally beyond words:

> With the sophistication derived from England's role as a world trader, its courts have permitted Chinese to break a saucer, a Mohammedan

exceed these limits. She indicated that she was willing to serve her jury duty, but the judge, rather than asking her what sort of pledge she could make, instead debated the correctness of her religious beliefs. In the declaratory relief that we grant,[50] we set forth a more proper approach.

Although we have reasoned here from first principles, we observe that our holding in this case is compelled by our own precedent as well. In Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1990), we held that the tax court violated the Free Exercise Clause by failing to accommodate a witness's religious objection to a God-free affirmation: "[The district court] erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any 'recognizable religious scruple,' but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief."[51] This holding is equally applicable to Murray-O'Hair's case.

D. Remedy

i. Damages

Murray-O'Hair seeks damages on account of Herman's

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to bow before the Koran and touch it to his head and a Parsee to tie a rope around his waist to qualify them to tell the truth.

United States v. Looper, 419 F.2d 1405, 1407 n.4 (4th Cir. 1969) (citing 6 Wigmore, Evidence §1818 [, at 391-92 (Chadbourne Rev. 1976)]).

[50] See infra sec. II.D.ii.

[51] Id. at 590-91. Other cases from this and other circuits have reached similar conclusions. See O'Hair, 675 F.2d at 691 (holding that, for standing purposes, a potential juror who would not swear to her belief in God "is . . . aggrieved by being excluded from jury duty because of her lack of religious belief"); Nicholson v. Board of Commrs. of Alabama State Bar Ass'n, 338 F.Supp. 48, 58 (M.D. Ala. 1972) (three-judge district court) (statutory oath required for admission to bar, containing words "so help me God," violates Free Exercise Clause); Gordon, 778 F.2d at 1401 (party cannot be required to give oath or affirmation against his religious beliefs without inquiry by court as to less offensive alternatives); Looper, 419 F.2d at 1407 (reversing conviction where defendant was not allowed to testify because he objected to use of God's name in affirmation).

actions. We find Herman is absolutely or qualifiedly immune from suit for damages.

A judge is absolutely immune from suit for damages resulting from any act of a judicial nature.[52] In determining the judicial nature of an act, we inquire whether:

> (1) the act complained of is a normal judicial function; (2) the events occurred in the judge's court or chambers; (3) the controversy centered around a case then pending before the judge, and (4) the confrontation arose directly and immediately out of a visit to the judge in his judicial capacity.[53]

The district court correctly found that Herman was judicially immune from attack on the basis of his issuing a judgment of contempt. Issuing a judgment of contempt is a normal judicial function;[54] Herman issued the order in his court; the voir dire process centered on some case or cases for which Judge Herman evidently had some judicial responsibility; and the controversy occurred during and arose directly and immediately out of a visit to Judge Herman in his judicial capacity.

However, as Murray-O'Hair and the district court point out, one can view this controversy through a different lens, and focus on Herman's attempt to compel Murray-O'Hair to take a juror affirmation, rather than his subsequent decision to jail her for her refusal. Viewed in this fashion, Herman's actions are less clearly entitled to absolute immunity, because the Supreme Court has implied that the selection of jurors is not an act of a judicial

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[52] Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir. 1982); Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

[53] Brewer, 692 F.2d at 396–97 (citations omitted).

[54] See Adams v. McIlhany, 764 F.2d 294, 298 (5th Cir. 1985), cert. den., 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986); Liles v. Reagan, 804 F.2d 493, 495 (8th Cir. 1986).

nature.[55]

Even if outside the scope of absolute immunity, Herman's attempt to administer an affirmation is protected by qualified immunity, as the district court concluded. We have held that

> [p]ublic officials are . . . immune from liability unless their conduct violates a clearly established constitutional or statutory norm, a question not necessarily answered by the certainty of the legal rule. An official enjoys qualified immunity if a reasonable official would be left uncertain of the application of the standard to the facts confronting him.[56]

Here, we readily conclude that the unlawfulness of Herman's actions would not be apparent to a reasonable official, as statutes and rules commonly provide[57] that affirmations be offered as an alternative to oaths, under the evident and long-standing[58] assumption that this alternative is sufficient to meet the concerns

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[55] See Ex parte Virginia, 100 U.S. 339, 348, 25 L.Ed. 676 (1880) (judge not immune from criminal charge for race discrimination in jury selection, because "duty of selecting jurors might as well have been committed to a private person as to . . . a judge. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, & c. Is their election or appointment a judicial act?"), quoted in Forrester, 108 S.Ct. at 544–45.

[56] Hopkins v. Stice, 916 F.2d 1029, 1030–31 (5th Cir. 1990) (citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987)).

[57] See, e.g., Fed.R.Evid. 603 advisory committee note (rule providing for affirmations in lieu of oaths "is designed to afford the flexibility required in dealing with religious adults [and] atheists . . . . "); see also U.S. Const. art. II, §1, cl. 8 (upon assuming office, President "shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) . . . ' "), art. VI, cl. 3 (legislative, executive, and judicial officers of federal and state governments "shall be bound by Oath or Affirmation" to support the Constitution); 1 U.S.C. §1 (providing for affirmation in lieu of oath); Fed.R.Civ.P. 43(d) (permitting "solemn affirmation" in lieu of oath); Fed.R.Bankr. 9012(b) (same); 28 U.S.C. §§ 459, 953 (empowering justices, judges, clerks, and deputy clerks to administer "oaths and affirmations"); Tex.Penal Code Ann. §1.07(a)(22) (definitions) (" 'Oath' includes affirmations"); Tex. Const. art. I, §5 (referring to "oaths and affirmations"); Tex.Rev.Civ.Stat.Ann. art. 25 (similar).

of those with religious objections to oaths.[59] Thus, Herman enjoys qualified if not absolute immunity.

ii. Declaratory Relief

Immunity does not, of course, insulate Herman from the reach of our equitable power. Indeed, the grant of immunity from damages for constitutional error makes the grant of declaratory relief more, not less, equitable.

Therefore, we declare that when a judge is confronted with a prospective juror's refusal, on grounds that constitutionally protected beliefs, to swear or affirm to answer voir dire questions truthfully, the judge should either allow the person to withdraw from jury duty without penalty or allow the prospective juror an alternative that requires him or her to make some form of serious public commitment to answer truthfully that does not transgress the prospect's sincerely held beliefs. The judge may require a prospective juror to state: (1) the specific basis for objection,

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[58] See, e.g., 7 & 8 Will. 3, ch. 34 (1695) ("every Quaker . . . shall instead of the usual Forme be permitted to make his or her Solemne Affirmation or Declaracion" in prescribed form, which included reference to God) (quoted in part in I Oxford English Dictionary 40 (compact ed. 1971)); McIntire's Case, 16 F.Cas. 151 (C.C.D.C. 1803) (No. 8,824) (juror who was not a Quaker and "not attached to any particular religious sect" was not permitted to affirm); Bryan's Case, 4 F.Cas. 506 (C.C.D.C. 1804) (No. 2,063) (Methodist juror, who had previously been sworn on juries and who did not know whether being sworn was contrary to Methodist principles to be sworn, was not permitted to affirm); Bank of Columbia v. Wright, 2 F.Cas. 647 (C.C.D.C. 1827) (No. 883) (witness who generally worshiped with, but was not member of, Quakers, was not permitted to affirm; construing Maryland statute applicable by its terms only to Quakers and other specified sects); King v. Fearson, 14 F.Cas. 520 (C.C.D.C. 1829) (No. 7,790) (witness, who worshiped with Quakers, whose application for membership was pending, and who was regarded in some respects as member, was permitted to affirm).

[59] That an assumption is both old and familiar does not make it correct, but these characteristics do increase the likelihood that a reasonable official could be ignorant of the assumption's falsehood.

and (2) what form of serious public commitment would accord with the prospective juror's constitutionally protected beliefs. The judge may require any form of avowal that "state[s] or symbolize[s] that [the witness will] tell the truth and which . . . purports to impress upon [her] the necessity for so doing."[60] Nothing more may be compelled if it impinges upon sincere, constitutionally protected beliefs. It is not for the judge to determine the validity or logic of the prospective juror's beliefs. Beliefs may be rejected only if they are patently insincere, bizarre, or not related to the free exercise of religion. If the prospective juror is unwilling to make a required avowal of the type stated, the judge may impose such penalty as may be provided by law for refusal to perform jury duty.

iii. Injunction

Having granted declaratory relief, we see in this case no reason to issue an injunction as well. Considerations of comity and decorum, similar to those present in Younger abstention contexts,[61] suggest that we enjoin state judges only where necessary to secure compliance with our decisions.[62] Here, we have no reason to suppose that our declaratory judgment would be inadequate, should the circumstances of this case arise again. Accordingly, we exercise our discretion and decline to grant injunctive relief.[63]

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[60] Looper, 419 F.2d at 1407. See also Fed.R.Evid. 603. This rule, although not itself applicable to state proceedings, is instructive. See also Madeley v. Kern, 488 F.2d-865, 866 (5th Cir. 1974) (citing Craig v. State, 480 S.W.2d 680, 686 (Tex.Cr.App.1972)); and O'Hair, 675 F.2d at 695.

[61] See Younger v. Harris, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971) (discussing "Our Federalism").

[62] See Pulliam v. Allen, 466 U.S. 522, 528, 104 S.Ct. 1970, 1973, 80 L.Ed.2d 565 (1984) ("injunctive relief against a judge rarely is awarded"); id. at 539 & n. 20, 104 S.Ct. at 1979 & n. 20 ("comity and federalism . . . [counsel] restraint by federal courts called on to enjoin the actions of state judicial officers"); Wooley, 430 U.S. at 711-12, 97 S.Ct. at 1433-34 (although practical effect of declaratory and injunctive relief is ordinarily virtually identical, court can generally protect plaintiff's interests with a declaratory judgment, rendering injunction unnecessary).

[63] See Nicholson, 338 F.Supp. at 59.

III. Conclusion

It is written that one need only "render . . . unto Caesar the things that are Caesar's."[64] Among those things are jury service and truthful testimony. But in assembling juries and in seeking the truth[65], Caesar's judiciary is constrained by the Constitution. While black-robed centurions may exact some pledge of veridicality, they may not require a protesting citizen to utter what is to her an expression of religious faith. As our accompanying footnotes attest, judges may choose, with restraint, to tincture their text with a religious reference or two; but they may not, in even a seemingly minimal fashion, compel others to do likewise. The Constitutional sin is in compulsion, not in expression.

We acknowledge the popular view that affirmation-taking is not a religious exercise, but we do not labor within a majoritarian jurisprudence. Our responsibility is to apply not the majority ethos, but the Constitution. That great document enforces no religious orthodoxy; it permits no compelled religious expression. Its provisions protect not just the popular, but also the un-; not just the sensible, but also the (seemingly) silly. In return, the Constitution repays our investment of tolerance with a dividend of individual autonomy and social freedom — freedom, in great measure, from the religious hostilities and petty oppressions that have rent nations throughout history and across the globe. An unconventional pledge is a small price to pay for liberty of conscience, for, when we enforce Murray-O'Hair's rights, ultimately, we enforce our own as well.

In holding that Judge Herman erred, we do not mean to say that he was not courteous and thoughtful. He apparently was, at least up until his perhaps intemperate decision to jail Murray-O'Hair.[66] But he was not sufficiently knowledgeable with regard

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[64] Matthew 22:21.

[65] Cf. John 8:32 ("and ye shall know the truth, and the truth shall make you free").

[66] We note that the contempt sanction vastly exceeds the penalty to which Murray-O'Hair would have been subject had she simply failed to appear for

to the primacy of the Constitutional guarantee of Free Exercise, which is to be watched, policed and rarely if ever trespassed. The judge's duty was to fashion statements of commitment to truth and integrity in the jury box and the jury room, and to do everything that would make for absolute integrity. The juror must be able to articulate her commitment to rectitude and truth finding as a juror without bias or prejudice. The judge had a duty to fashion a statement for the prospective juror so that she could elucidate these concepts. This he failed to do.

We say that what the judge did was error, but it was not an intentional evil. Our decision should be understood not as chastisement by any means, but as exhortation — a reminder that the Free Exercise Clause requires something more; here, a back-and-forth interaction designed to elicit positive cooperation from a protesting juror or witness.

For the reasons stated in this opinion we reinstate the Society as a plaintiff; AFFIRM the district court's dismissal of defendants other than Herman; AFFIRM the district court's denial of damages and injunctive relief; and grant declaratory relief as set forth above. We REMAND to allow the district court to decide whether to exercise jurisdiction over Murray-O'Hair's pendant state claims, and for further proceedings not inconsistent with this opinion.[67]

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jury service. See Tex. Gov't Code Ann. §62.111 (maximum $100 fine for failure to attend court for impaneling); see also Tex.Code Crim.Proc.Ann. art. 35.01 (maximum $50 fine for juror's failure to appear at start of trial when name called).

[67] Because this opinion concerns an affirmation without any reference to God, we have no occasion to consider the scope and constitutionality of the Texas rules which require that the oaths administered to jurors conclude with the phrase "so help you God." See Tex.Code Crim.Proc.Ann. arts. 19.34 (grand jurors), 35.02 (venire), 35.22 (impaneled jurors); Tex.R.Civ.P. 226 (venire), 236 (impaneled jurors); Craig v. State, 480 S.W.2d 680, 682-84 & n. 6 (Tex.Crim.App. 1972); Madeley v. Kern, 488 F.2d 865, 866 (5th Cir. 1974); O'Hair, 675 F.2d at 695.

GARWOOD, Circuit Judge, dissenting.

I respectfully dissent.

I join my colleagues in their reverence for our nation's Constitution. And I accordingly believe that what the Constitution says on the subject of oaths and affirmations should be at least the starting point for our consideration. The Constitution speaks to this subject in several places, most prominently in clause 3 of Article VI:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." (Emphasis added).[1]

It would thus appear that the Constitution recognizes that affirmations, as distinguished from oaths, are not religious tests, that government officers *must* be required to take either an oath or affirmation,[2] and, by implied extension, that requiring witnesses, jurors, or the like to do so is perfectly proper.

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[1] Other references to oath or affirmation are: Article I, section 3, clause 6, providing that when the Senate tries impeachments "they shall be on Oath or Affirmation"; Article II, section 1, clause 8, providing that the President "shall take the following Oath or Affirmation — 'I do solemnly swear (or affirm) that I will faithfully execute . . . ' "; Amendment Four, providing "no warrants shall issue, but upon probable cause, supported by Oath or affirmation."

[2] Cf. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (striking down, under Fourteenth Amendment, Maryland requirement that state officers make "a declaration of belief in the existence of God" without reaching question whether Article VI's "no religious Test" language applies to state as well as federal officers, but inferentially relying by analogy on the same principle).

The Constitution does not speak to the exact form or manner of making an affirmation (or an oath),[3] but it is reasonably inferable that what was intended was the same sort of formal, conscience-arousing, express and unequivocal personal commitment — in the case of a witness, to tell the truth — made before an appropriate officer, as is involved in taking an oath, but without the latter's invocation or involvement of any form of deity or religious obligation.[4]

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[3] With the sole exception of the unique presidential oath or affirmation.

[4] See, e.g., Am.Jur.2d, Oath and Affirmation, §3 at 1048-49:

> "While an oath, in its strict sense, involves the idea of calling on God to witness what is averred as truth, an affirmation is an undertaking to tell the truth equally as solemn as the oath, but does not invoke the Deity . . . . The affirmation has evolved as an alternative for those who are unable to take the religious oath, either because the oath conflicts with their religious principles or because they do not subscribe to any religion at all." (Footnotes omitted).

See also id. at §6, p. 1050: "The affirmation has the same purpose [as an oath]: to bind the conscience. The only difference is that the affirmation does not impress the person taking it with a sense of religious obligation." (Footnote omitted).

See also Wright & Gold, Federal Practice and Procedure: Evidence § 6044 at 274-75:

> "Rule 603 [Federal Rules of Evidence] does at least suggest two necessary characteristics of both oaths and affirmations. First, they are declarations to tell the truth. This means that an oath or affirmation must contain an unequivocal promise or commitment to relate the truth. Second, these declarations must be administered in a solemn manner calculated to awaken the conscience and remind the witness of his duty to speak the truth.
>
> "The manner in which the conscience of the witness is awakened by an oath, however, differs from the manner in which that effect is produced by an affirmation and has a significant effect on both form and content. In the case of an oath, the witness appeals to God for assistance or otherwise invokes God in connection with his promise to tell the truth. God is involved for the purpose of impressing the witness with the seriousness of the occasion and with the threat of

This is not to say that some particular nonessential aspect of the form of what is tendered as an affirmation within the foregoing general definition may not nonetheless be, to the person called upon to make it, the equivalent of an oath invoking a deity or religious obligation. To some the word "affirm" may have the same sort of religious significance that the word "swear" does to others; similarly, to some the raising of a hand on such an occasion may constitute the making of a religious sign. See Ferguson v. CIR, 921 F.2d 588 (5th Cir. 1991) (witness considers use of the word "affirm" to be prohibited by the same Biblical directives that preclude the use of "swear"); Gordon v. State of Idaho, 778 F.2d 1397, 1400, 1401 (9th Cir. 1985) (witness Gordon had "religious objection to taking an oath or using the word 'affirmation.' The court abused its discretion in insisting that Gordon use either the word 'swear' or 'affirm' in light of Gordon's sincere religious objections"; "Gordon has demonstrated that raising his right hand and swearing an oath or making an affirmation violates his sincerely-held religious beliefs"). United States v. Looper, 419 F.2d 1405 (4th Cir. 1969) (witness, member of Radio Church of God, objects to holding up his hand, as well as to any oath or affirmation that has " 'God's name in it' "). Of course, these examples do not exhaust the genre. See, e.g., Moore v. United States, 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (error to prevent testimony by member of Harshmanite Church who declined "because of religious scruples, to use the word 'solemnly' in affirming to tell the truth"; "[t]here is no requirement that the word 'solemnly' be used in the affirmation").

In marked contrast to the foregoing, however, there may be those — and nothing in this record suggests that appellant O'Hair is not among them — who object to formally making, to a public official authorized to administer an oath or affirmation, any sort of express declaration of unequivocal personal commitment to tell the truth, on the basis that any such exercise by its very

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divine punishment for lying. An affirmation does not invoke God. Rather, the conscience of the witness is aroused by the solemn manner in which the declaration is given and received." (Footnotes omitted; emphasis added).

nature is religious in character (or contravenes the objector's religion) so that by engaging in it the person either expresses a belief in religion (or a religious belief) that he does not have or does something forbidden by his religion. Purely for ease of reference, I refer to this variety of objection as a "generic" objection. I conclude that the Constitution does not mandate that such a generic objection be sustained, but rather permits the government to require a thus-objecting witness to formally make to the appropriate officer some express declaration of unequivocal personal commitment to tell the truth.[5] In my view, the accommodation of religious and expressive freedom with the needs of civil administration has in essence been made in the constitutional provisions allowing affirmations in lieu of oaths, but requiring one or the other while prohibiting religious tests.

Thus far my ultimate conclusions do not depart significantly, if at all, from those of the majority, however different may be the roads we have travelled in arriving there. From here on, however, the destinations are distinct.

Judge Herman advised O'Hair that he respected her "right to exercise your constitutional rights to freedom of religion and, therefore, I will offer an affirmation without any recognition or any statement, any reference to God or anything of that nature, and at this time I would like you to raise your hand and be affirmed by the Court" (emphasis added). O'Hair replied "I cannot affirm, sir. That is just as religious as an oath." Judge Herman then advised "I am merely asking you to affirm that whatever questions would be propounded to you, that you will give true answers." O'Hair responded "I am trying to evade participating in a religious statement"; Judge Herman stated "I am not asking you to participate in a religious statement"; O'Hair then asserted "an affirmation, my understanding, is a religious statement"; to which Judge Herman rejoined "the Court does not agree with you on that matter."

There is no showing that O'Hair ever made anything other than a generic objection to the entire affirmation process. She

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[5] Nor do I read the majority opinion as holding otherwise.

never told Judge Herman that she objected to the particular word "affirm," or to raising her hand, or to any identified specific aspect of what she was being asked to do. Most significantly, O'Hair never informed Judge Herman, expressly or implicitly, that she was willing to formally make to him any sort of express declaration of personal commitment to tell the truth or that "whatever questions would be propounded to you, that you will give true answers."[6] Nor is there any indication that Judge Herman took advantage or tricked O'Hair. On the contrary, Judge Herman was patient and engaged in dialogue with her, and did not cut her off; she was obviously prepared for the occasion and was represented by counsel.

In this respect, the present case is far removed from those decisions relied on by the majority. In Moore the defendant, a member of the Harshmanite Church, was not allowed to testify as he had "declined, because of religious scruples against oath taking, to use the word 'solemnly' in affirming to tell the truth." The Supreme Court reversed the conviction on direct appeal, observing "[t]here is no requirement that the word 'solemnly' be used in the affirmation." Thus there was a specific objection to a specific word, and, inferentially, a manifested willingness to affirm without use of that specific word. The Looper court relied on Moore, and reversed a conviction on direct appeal, because the defendant, a member of the Radio Church of God, was not allowed to testify when he refused the judge's direction that he "hold up his right hand and appeal to God," although the defendant informed the court "I can't if it has God's name in it. If you ask me if I'll tell the truth, I can say that" and "I can't hold up my hand, Judge." There the demanded form was facially religious, specific objection was made, and there was an affirmative indi-

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[6] Similarly, there is no suggestion that Judge Herman understood O'Hair to be merely making a specific objection to the word "affirm" (or to the raising of her hand) and to be willing to formally make to him some sort of express declaration of personal commitment to tell the truth if it but omitted that specific word (and/or gesture); or that had Judge Herman so understood he would nevertheless have insisted on use of the word "affirm" (or on hand raising).

cation of a willingness to make a declaration in which the specifically objected-to matters were removed. A divided Ninth Circuit panel in Gordon relied on Moore and Looper in reversing on direct appeal the dismissal of a civil action due to the pro se plaintiff's refusal to take an affirmation in the precise form, including the word "affirm," which the district court had specified "despite Gordon's religious objection to . . . using the word 'affirmation.' " 778 F.2d at 1400. The majority held that "[t]he court abused its discretion in insisting that Gordon use . . . the word . . . 'affirm' in light of Gordon's sincere religious objections." Id. Again, there was a specific objection to a specific word.

In our recent Ferguson decision we reversed on direct appeal a Tax Court decision for the government, holding that that court erred in refusing to allow the pro se taxpayer Ferguson to testify when she would not use the word "affirm," which she regarded as equally prohibited by the Bible as the word "swear." The Tax Court gave her almost no chance to make any explanation and refused to consider her tendered form of declaration taken from that approved by the Louisiana Supreme Court in Staton v. Fought, 486 So.2d 745 (La. 1986). We relied on Moore, Looper, and Gordon, and observed concerning the latter: "Like Ms. Ferguson, Gordon objected to using either the word 'swear' or 'affirm' and offered an alternative statement. The Ninth Circuit held that the trial judge abused his discretion by refusing to even consider Gordon's proposed alternative." Ferguson, 921 F.2d at 589. Plainly Ferguson does not compel the result here, for there the pro se witness, unlike the counseled O'Hair, affirmatively indicated her willingness to make a satisfactory declaration to the judge.

Further, it must be recalled that Moore, Looper, Gordon, and Ferguson are all direct federal appeals. This is a section 1983 suit challenging the actions of a state judge in a previous state proceeding before him. Neither Moore nor Looper purports to invoke constitutional principles. While Gordon and Ferguson do invoke the First Amendment, they clearly do so in the context of applying and interpreting the rather open-ended provisions of Fed.R.Evid. 603 (and related Federal Rules of Civil Procedure). Nor do either Gordon or Ferguson purport to be constitutionally

based insofar as they may expressly or impliedly speak to the matter of what burden rests on the judge, and what on the objecting party, to make their respective positions clear to one another. Indeed, Gordon observes "[b]y failing to explore less restrictive means of assuring truthful deposition testimony, the district court abused its discretion. . . ." Id., 778 F.2d at 1401 (emphasis added). In Ferguson we relied heavily on Gordon, and inferentially adopted the same approach. Thus Ferguson observes that if the Tax Court "had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved,'" and particularly noting in this connection that "Ms. Ferguson was proceeding pro se." Ferguson, 921 F.2d at 590–91.

There is simply no warrant in principle or authority for transmuting an "abuse of discretion" into a constitutional mandate. Moreover, I find nothing to support the notion — necessarily implicit in the majority's holding — that a state is constitutionally barred from requiring a prospective witness or juror, especially one represented by counsel, to adequately articulate each particular, specific aspect of a proffered oath or affirmation to which there is objection and the reasons for each objection.

O'Hair, though represented by counsel and given full opportunity to do so, made no objection to any specific, identified particular word or gesture in the procedure designed to have her make a formal declaration to the judge of her personal commitment to tell the truth; she suggested no alternate form; and she never indicated any willingness to make any form of such a declaration. Nothing establishes that O'Hair had (or, indeed, has) anything other than a generic objection to the procedure. In these circumstances, Judge Herman did not violate the Constitution by insisting that O'Hair be either sworn or affirmed.

Finally, it also seems to me that in any event it is wholly inappropriate for this Court to grant O'Hair declaratory relief against Judge Herman. Judge Herman is the sole defendant, and O'Hair is the sole plaintiff, with respect to whom we grant such relief. No one else is benefitted or bound thereby. The incident made the basis of this suit took place, and concluded, more than three years ago. Except as regards that discrete, completed inci-

dent, there is no pending dispute or relationship between Judge Herman and O'Hair. In his dealings with O'Hair on that particular occasion, it is apparent that Judge Herman, insofar as the majority finds his conduct unconstitutional, followed no preconceived set or standard manner of proceeding (either of his own creation or as specified by state or local law), but rather acted entirely ad hoc. He was faced with a situation and dealt with it as best he could. There is no indication that, should the matter again arise, he would not of his own proceed with enough more "back-and-forth interaction" to achieve the majority's blessing. More significantly, there is no showing of any real and immediate threat that O'Hair will again be called upon by Judge Herman to take an oath or affirmation. There is nothing to indicate that O'Hair has ever been before Judge Herman since the incident in question, or that there is anything pending or threatened that is likely to bring her before him. Travis County, where O'Hair and Judge Herman live, has over 500,000 residents, 13 district judges, 7 county-court-at-law judges, 1 probate court judge, and five justices of the peace.

In circumstances such as these, O'Hair would appear to lack standing to seek declaratory relief against Judge Herman. See City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); Rocky v. King, 900 F.2d 864 (5th Cir. 1990); Brown v. Edwards, 721 F.2d 1442, 1446–47 (5th Cir. 1984); Northern Virginia Women's Medical Center v. Balch, 617 F.2d 1045, 1048–49 (4th Cir. 1980). Even if there were standing, the granting of declaratory relief "rests in the sound discretion of the trial court." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2759 at 645. Considerations of comity and the gross intrusiveness of the remedy — micromanaging a state judge's future handling of any oath or affirmative process involving a particular individual — balanced against the remote and speculative nature of any future relevant controversy between the parties, strongly point to exercising any such discretion so as to deny declaratory relief.[7] Cf. Seniors v. Arnold, 284 F.2d 106 (5th Cir. 1960). At the very least, such relief should not be granted on appeal without having been first addressed by the trial court.

I would uphold the judgment in Judge Herman's favor. And, in any event, I would not grant O'Hair declaratory relief against him. I accordingly dissent from the majority's contrary holdings.

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[7] The only real practical effect of the declaratory relief is to make Judge Herman personally liable for O'Hair's attorney's fees, likely a far more significant amount than any damages she might have recovered from him (under the majority's analysis) had he not had qualified or absolute immunity.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOCIETY OF SEPARATIONISTS, INC., et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. A-89-CA-1021
HONORABLE GUY HERMAN, Judge of Travis County Court at Law, et al., Defendants.	§	

ORDER

This §1983 action arises out of a judgment of contempt entered by Defendant Guy Herman ("Herman"), Judge of the Probate Court Number One of Travis County, Texas, against Plaintiff Robin Murray-O'Hair ("Murray-O'Hair") for failure to either take the juror's oath or affirm, as required by Rule 226 of the Texas Rules of Civil Procedure and Article 35.02 of the Texas Code of Criminal Procedure. Plaintiffs seek a declaration that Plaintiff's First and Fourteenth Amendment rights have been denied due to exclusion from jury service because of their religious beliefs; that Murray-O'Hair's First and Fourteenth Amendment rights were violated due to her imprisonment for objecting to the oath; and an injunction against further use of the juror oath or any affirmation in preparing potential jurors for voir dire questioning.[1]

The Defendants have filed a motion to dismiss or, alternative-

[1] Plaintiffs originally included an additional claim regarding the juror information cards which are sent to prospective jurors prior to selection. These cards include a space requesting information regarding jurors' religious affiliation. Plaintiffs have voluntarily withdrawn this claim.

ly, for summary judgment. The Plaintiffs have filed a motion for leave to file a motion for summary judgment, which the Court will GRANT. Both motions will be considered in the following analysis.

I. SUMMARY JUDGMENT

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing summary judgment. Id. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. Id.; Jones v. Western Geophysical Co. of America, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-moving party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. Id.

Once the movant has shown the absence of material factual issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. Kleckner v. Republic Van & Storage Co., 556 F.2d 766, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be en-

tered against him." In this respect, the burden of the non-moving party is not especially heavy; however, he must show specific facts that present a genuine issue of material fact worthy of trial rather than showing mere general allegations. See Gossett v. Du-Ra-Kel Corp., 569 F.2d 869, 872 (5th Cir. 1978).

II. BACKGROUND

The facts in this case are not in dispute. On December 15, 1987, Murray-O'Hair appeared, as summoned, for jury duty in the Travis County Courthouse. The prospective jury panel was told by a deputy court clerk to rise and take the oath which precedes voir dire questioning. Murray-O'Hair objected to the oath on the basis of her status as an atheist. Herman, the presiding judge, called Murray-O'Hair to the bench and asked her why she would not take the oath. When Murray-O'Hair explained that she was an atheist, Judge Herman informed her that she could affirm instead of taking the oath. Murray-O'Hair refused on the basis that the affirmation still included the words "So help me, God." Murray-O'Hair was told to be seated, and the remaining jurors were sworn in.

Murray-O'Hair was then told to proceed to Judge Herman's regular courtroom ("Probate Court Number 1"), where Judge Herman again requested her to take the oath on the record. The Plaintiff refused again in her belief that both the oath and affirmation were religious statements in which she could not participate because of her status as an atheist. Judge Herman then stated:

> And I respect your right to exercise your constitutional rights to freedom of religion and, therefore, I will offer an affirmation without any recognition or any statement, any reference to God or anything of that nature, and at this time I would like you to raise your hand and be affirmed by the Court as to your qualifications as a juror.

Transcript of Contempt Hearing, p. 3. Murray-O'Hair once again refused. Judge Herman then informed the Plaintiff that her con-

tinued refusal to either take the oath or affirm would result in his holding her in civil contempt. After offering her a final opportunity to affirm, the Plaintiff refused and Judge Herman declared her in contempt of court. Murray-O'Hair was then sentenced to incarceration for three days. She was released on bond approximately 6 hours later, and Judge Herman commuted the contempt sentence to time served on January 7, 1988.

III. CLASS CERTIFICATION

The named Plaintiffs in the Original Complaint are Murray-O'Hair and the Society of Separationists, Inc., a national, nonprofit organization composed of atheists. Plaintiffs attempt to file this suit as a class action. However, there is no indication that this suit meets the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The Society of Separationists is an organization and will obviously not be subjected to the constitutional deprivation asserted by Murray-O'Hair — organizations are not called for jury duty. Further, there is no indication that membership of this society is limited to the State of Texas. It is only the Texas procedure of swearing in jurors that is at issue.

Additionally, the Plaintiffs' complaint reflects only one other unnamed individuals [*sic*] who has been held in contempt and jailed for failure to take the juror's oath. There is no indication that the purported class is so numerous that joinder of all members would be impracticable. Accordingly, the Court is persuaded that this action should not be certified as a class action and

that Plaintiff Society of Separationists, Inc. should be dismissed for failure to state any injury or claim upon which relief could be granted.

IV. IMPROPERLY NAMED DEFENDANTS

Plaintiff has included a number of Defendants in her complaint, including the Honorable Bill Aleshire, County Judge of Travis County, the Travis County Court Clerk, Travis County Sheriff, the Travis County Court System, and the Travis County Court Bailiffs, as well as Travis County itself.

A review of Plaintiff's complaint discloses no allegations whatsoever regarding any actions taken by Defendant Bill Aleshire connected with the facts giving rise to Plaintiff's cause of action. In fact, Defendant Aleshire's name is mentioned nowhere in Plaintiff's complaint except in its heading. Accordingly, the Court is persuaded that the Defendant's Motion for Summary Judgment should be granted as to Defendant Bill Aleshire.

Additionally, neither the "Travis County Court System" nor the "Court Bailiffs of Travis County Courts" are legal entities. Defendants have indicated that neither of these "organizations" was involved in the activities which form the basis of Plaintiff's suit. Plaintiff has presented nothing to establish her claim against these defendants except the unsubstantiated allegations that they were involved in the deprivation of her constitutional rights.

To the extent that some unnamed bailiff was involved in the jailing of Murray-O'Hair after she was held in contempt, the summary judgment proof establishes that such actions occurred in response to a facially valid court order. As such, the unnamed bailiff involved would be granted absolute quasi-judicial immunity. See Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989). In light of this, the Court has determined that the Defendant's Motion for Summary Judgment should be granted as to the claims asserted against Defendants Travis County Court System and Court Bailiffs of Travis County Courts.

V. RES JUDICATA

The acts forming the basis of this cause of action have been the subject of at least two separate lawsuits: a habeas corpus proceeding and appeal in the state court, and a prior §1983 action filed in the Austin Division of the Western District of Texas, styled Jon G. Murray, Madalyn O'Hair, Robin Murray-O'Hair and the Society of Separationists, Inc. v. Travis County District Court and Jim Mattox, Attorney General of the State of Texas, cause number A-87-CA-489. In the federal suit, Judge Lucius D. Bunton ruled that the Plaintiffs had no Constitutionally protected interest in sitting on a jury. Jon G. Murray, et al. v. Travis County District Court, et al., No. A-87-CA-489 (W.D. Tex. March 24, 1989), aff'd., 898 F.2d 150 (1990).[2] Judge Bunton ruled that neither the juror information cards nor the juror oath violated the First Amendment establishment clause. This ruling is clearly dispositive of the claims asserted by Plaintiff in the present action relating to the constitutionality of the juror oath, and the Defendant's Motion for Summary Judgment shall likewise be granted as Plaintiff's claims regarding the constitutionality of the juror oath under Federal and State law.

VI. TRAVIS COUNTY

The Plaintiff asserts that the County should be liable since the county courts administer the juror's oath. A county cannot be held liable in a §1983 action solely under a doctrine of respondeat superior. To state a claim against a local government, the Plaintiff must establish that her injury occurred pursuant to some policy or some custom which represents official policy. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). An "official policy or custom" consists of:

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[2] The Plaintiffs assert that they have appealed this decision to the United States Supreme Court. Plaintiffs' application for writ of certiorari was denied on October 1, 1990.

(1) A policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy making authority; or

(2) A persistent widespread practice of city officials or employers, which, although not authorized by officially adopted or promulgated policy, is so common and well settled as to constitute a system that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributed to the governing body of the municipality or to an official who that body has delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under §1983 unless they execute official policy as defined above.

Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987), quoting Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc).

The Plaintiff does not point to any policy statement, ordinance, regulation or other officially adopted decision by the County which was the moving force behind the deprivation she alleges. Nor does she identify any other Travis County Court or judge who may have held jurors in contempt for refusing to take the juror oath. Plaintiff makes only the bare conclusory allegation that all of the Travis County courts are involved. This is insufficient to meet the specific, factual pleading requirements in a §1983 action. Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985). Further, Plaintiff's allegations center around a court rule that is not promulgated by Travis County or its courts, but by the State of Texas through the Texas Rules of Civil Procedure and the Texas Code of Criminal Procedure.

Additionally, Plaintiff has made no assertion that Judge Herman is a policymaker for the County, for whose actions the County might be bound. Therefore, the Court is persuaded that Defendant's Motion for Summary Judgment should be granted as to the allegations against Travis County.

VII. SHERIFF OF TRAVIS COUNTY

Plaintiff complains that her punishment was instant incarceration rather than a fine. She further complains that she was "forcibly escorted to Travis County Jail, forced to strip naked, forced to endure a cold water shower, deprived of full clothing, since defendant County's employees would not even let her have shoes. She was then placed in a prison cell block with criminals to her horror and distaste." Plaintiff's Original Complaint, p. 12 (emphasis in original).

Plaintiff's complaint includes no factual allegations regarding any actions taken personally by the Travis County Sheriff with respect to her incarceration. At most the Plaintiff complains of the practice of treating those held in civil contempt the same as those incarcerated on criminal charges. The Sheriff has raised the issue of qualified immunity in his Answer, and again in his Motion for Summary Judgment. Plaintiff has not indicated or presented any proof or argument to overcome this defense. She has not presented any summary judgment proof that would indicate specific facts showing either malicious, arbitrary or capricious conduct, or that the Sheriff violated any clearly established law. Nor has she presented any argument or authority as to her allegation that persons jailed for civil contempt are somehow entitled to better treatment than those jailed on criminal charges.

The summary judgment proof presented establishes no more than that Plaintiff was jailed pursuant to a facially valid court order, and the Court is persuaded that Defendant Sheriff of Travis County is entitled to the protection of the defense of qualified immunity.

VIII. JUDICIAL IMMUNITY

Defendant Herman asserts that he was acting in his judicial capacity at all times and is, therefore, protected by absolute judicial immunity. The purpose of judicial immunity is to protect the finality of judgments, discourage inappropriate collateral attacks, and protect "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." Forrester v.

White, __ U.S. __ , 108 S.Ct. 538, 543 (1988). The Supreme Court has identified a "functional" approach to define the parameters of absolute judicial immunity.

> Under that approach, we examine the nature of the functions with which a particular official or class of officers has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.

Id. at 542. However, it is only "judicial" acts that will invoke the doctrine, not administrative, legislative, or executive duties which a judge may on occasion be assigned by law to perform.

In performing this functional analysis, the Fifth Circuit has identified four factors to be considered: (1) whether the act complained of is a normal judicial function; (2) whether the act occurred in a courtroom or appropriate adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972). See also Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985), cert. den., __ U.S. __ , 106 S.Ct. 883 (1986).

The act of which Plaintiff complains is that of holding her in contempt and having her jailed for refusing to take the juror oath or to affirm. The Court is persuaded that Judge Herman should be entitled to absolute immunity as a result of the issuing of the judgment of contempt. Issuing judgments of contempt is clearly a normal judicial function. See Liles v. Reagan, 804 F.2d 493 (8th Cir. 1986); Adams v. McIlhany, supra. A court must have the power to enforce its own orders. Additionally, the judgment of contempt in this case occurred in open court, and the acts complained of arose directly out of a visit to the judge in his official capacity. While the record is not clear as to whether Judge Herman was selecting a jury for a particular case or empaneling them for later selection, not all of the factors need be present for immunity to apply, nor need each be given equal weight in all cases. Adams v. McIlhany, supra.

Plaintiff argues that the focus of the Judge's actions should be upon whether the giving of the juror's oath was a judicial act. If the argument is phrased in such terms, absolute judicial immunity might not be available in light of the Supreme Court's recent decision in Forrester v. White, __ U.S. __ , 108 S.Ct. 538 (1988). In explaining the distinction between judicial and administrative acts performed by a court, the Forrester decision relied upon its prior decision in Ex Parte Virginia, 100 U.S. (10 Otto) 939, 25 L.Ed. 676 (1880). The Virginia Court "declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts." Forrester v. White, 108 S.Ct. at 544. The reasoning behind its decision was:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

Forrester v. White, 108 S.Ct. at 544-545, quoting Ex Parte Virginia, 100 U.S. (10 Otto) at 348 (emphasis added).

If deprived of absolute judicial immunity, the Court is persuaded that Judge Herman would still be entitled to qualified immunity. Qualified immunity is a defense available to public officials performing discretionary functions " . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very

> action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, ___ U.S. ___ , 107 S.Ct. 3034 (1987).

In the present case, Judge Herman acted pursuant to Texas law. Rule 226 of the Texas Rules of Civil Procedure provides that prior to voir dire, the jurors shall be sworn "by the court or under its direction. . . ." Art. 35.02 of the Texas Code of Criminal Procedure provides: "To those present the court shall cause to be administered this oath. . . . " The oath, therefore, is to be issued by the judge or at his direction.

Additionally, Section 21.001 of the Texas Government Code outlines the inherent power and duty of courts:

> (a) A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.
>
> (b) A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done.

Plaintiff further complains that she was incarcerated rather than fined, claiming that a fine is the penalty for failing to appear for jury duty. Article 21.002 defines the authority of a court in punishing for contempt. Article 21.002 provides, in pertinent part:

> (a) A court may punish for contempt.
>
> (b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

The summary judgment proof presented establishes that Judge Herman ordered the Plaintiff to either take the juror's oath

or affirm. The Plaintiff failed to comply with the Court's order. The Court, therefore, was acting within its powers to hold Plaintiff in contempt for failing to comply with its order. The punishment originally given, 3 days confinement, is within the punishment range provided by statute. Accordingly, the Court is persuaded that the Defendant's Motion for Summary Judgment should be granted as to Defendant Guy Herman.

IX. COURT CLERK

The allegations concerning the Court Clerk revolve around the administration of the juror's oath. The Court is persuaded that in this circumstance, the clerk is likewise protected by qualified immunity, and that the Defendant's Motion for Summary Judgment should be granted as to the claims against the Court Clerk.

X. STATE COURT CLAIMS

The Plaintiff has asserted numerous state court claims centering around her incarceration. She seeks tort damages under the common law causes of action of assault, false imprisonment, and intentional infliction of mental distress. As these are state law claims and there is no further basis for federal jurisdiction, the Court will not exercise its discretion to entertain these claims under pendent party jurisdiction.

> Needless decisions of state law should be avoided, both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certain, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (citations omitted).

X. RULE 11 SANCTIONS

The Defendants assert that Rule 11 sanctions are appropriate in this action because of its frivolous nature. The Court agrees that Rule 11 sanctions are in order because Plaintiff asserted claims that have already been adjudicated against her in a previous suit.

Accordingly, it is ORDERED that the Defendants' Motion for Summary Judgment is GRANTED and that the Plaintiff's Motion for Summary Judgment is DENIED. It is further

ORDERED that Plaintiff's state law causes of action are DISMISSED without prejudice. It is further

ORDERED that Defendants' request for Rule 11 Sanctions is GRANTED and that Defendants recover the reasonable and necessary attorneys' fees incurred in defending this suit. Defendants shall submit their motion request for attorneys' fees in compliance with Local Rule CV-7 (j) within twenty (20) days from the entry of this Order, at which time Final Judgment shall issue.

SIGNED this 4th day of October, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOCIETY OF SEPARATIONISTS, INC., et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. A-89-CA-1021
HONORABLE GUY HERMAN, Judge of Travis County Court at Law, et al., Defendants.	§	

FINAL JUDGMENT

Came on this date to be considered, sua sponte, the status of this action. On October 5, 1990, the Court granted the Defendants' Motion for Summary Judgment and denied a Motion for Summary Judgment filed by the Plaintiffs. The Court further granted the Defendants' request for Rule 11 sanctions and Ordered the Defendants to submit their request for attorneys' fees in compliance with local Rule CV-7 (j) within twenty days from the entry of that Order. The Defendants have failed to respond to the Court's Order, and the Court is persuaded that the Defendants' award of attorney's fees should be stricken. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Defendants' Motion for Summary Judgment is GRANTED and that the Plaintiff's Motion for Summary Judgment is DENIED. It is further

ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing in their suit against Defendants. It is further

ORDERED, ADJUDGED and DECREED that Plaintiffs' state law causes of action are DISMISSED without prejudice. It is further

ORDERED, ADJUDGED and DECREED that any relief not expressly granted in this Judgment is hereby DENIED.

SIGNED this 19th day of November, 1990.

Appendix E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JON G. MURRAY, ET AL.,
A-89-CA 1463

v.

TRAVIS COUNTY DISTRICT COURT and JIM MATTOX,
Attorney General of the State of Texas,

ORDER

BEFORE THIS COURT is Defendant Attorney General of the State of Texas's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant's Motion was filed on September 10, 1987. On January 31, 1989, the cause was transferred to this Court's docket and set for trial on March 27, 1989. Upon review of the Complaint, the Motion to Dismiss and response of Plaintiffs, and consideration of the legal authorities, the Court is of the opinion that pursuant to Rule 12(b)(6), Plaintiffs' Complaint should be dismissed.

Plaintiffs allege a continuing pattern whereby they (1) respond as requested for jury service in the Travis County District Court, (2) refuse to take a "God" oath, and (3) are excluded by the presiding Judge from jury service. The manner of excluding the Plaintiffs from jury service varies from incident to incident, however, the differences are not material. Plaintiffs also object to Travis County's use of a jury information form which requests persons state their religious preference. Plaintiffs do not state in their Complaint the manner in which the Court uses the information or that the bare act of making the request worked a hard-

ship on them other than their view that they are wrongfully excluded from jury service. It appears that the Plaintiffs contend that the jury information form in two manners violates the Constitution: (1) it violates the doctrine of separation of church and state; and (2) causes them to be denied the opportunity to perform jury service. Plaintiffs do not explain whether or how they filled out the jury information form question relating to religious preference.

Defendants move for dismissal on three grounds: (1) The doctrine of Federal Court abstention requires this Court to refrain from interfering with the management of the state government when the Constitutional challenge is intertwined with an ambiguous issue of state law and there is a likelihood that clarification of the state law will moot or substantially alter the federal issue. (2) The doctrine of sovereign immunity prevents the maintenance of suit under 24 U.S.C. Sec. 1983 against a state and its agencies. (3) Many of Defendant's claims were previously adjudicated in a federal forum.

Plaintiffs' complaint raises two issues: (1) Does the practice of a State trial court in excluding from jury service persons who refuse to make an oath deny a vested interest? (2) Does such a practice violate the Constitutional provision of separation of church and state?

Because the Court is of the opinion that Plaintiffs have no Constitutionally protected interest in sitting on a jury and that jury oath which refers to a deity does not violate the principle of separation of church and state, the cause should be dismissed pursuant to rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Court will not abstain from ruling on the Constitutional challenge; it does not appear that the Court's ruling this day will have any interfering effect on any State Court suit. Further, the Court agrees in part with the Plaintiffs that some of the challenges raised in this cause and the subject of this memorandum opinion are distinct from previous Federal Court matters.

DISCUSSION

Plaintiffs brought suit on August 11, 1987, and were granted leave to amend their complaint after Defendants interposed several Motions to Dismiss. The Amended Complaint in general complains of the jury summoning, selection and impaneling procedures utilized by the Courts of Travis County. The jury summons information card, Plaintiffs contend, violates the establishment and free exercise clauses of the First Amendment to the U.S. Constitution, "in that jurors are forced to profess a religion and that the State of Texas . . . seems to be endorsing and thus establishing the religion of Judeo-Christianity." These purple prose are at best reaching and at worst, barely sufficient to survive scrutiny under the standard of review of Rule 11, Federal Rules of Civil Procedure.[1]

Though the Plaintiffs argue that several of their number are "involved in civil litigation" and they fear that they could not receive a fair jury trial because of the use of a "God" oath, this claim is not properly before this Court as Plaintiffs have not alleged facts giving rise to a justiciable claim; the right to jury issue is at best,

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[1]Rule 11, F.R.C.P. provides in pertinent part:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

a potential disability.

The denial of a public benefit based on an utterance related to First Amendment is not permitted. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). This principle has been applied to benefits such as public employment, and bar membership. The Court has not discovered, nor have Plaintiffs pointed out, any instance whereby a potential juror has standing to assert the denial of a public benefit related to jury service. The jury fee is nominal and not a benefit. Plaintiffs do not allege that they are denied the fee due them for reporting for jury service.

Trials are public forums and a citizen who wishes to see the Courts in action may visit at any time. However, there is no Constitutionally cognizable right to view Courts from the vantage point of a jury box. There is an important distinction to be made between a state practice which directly interferes with the exercise of a belief — whether religious or not — and a practice which has the secondary effect of limiting participation in certain interesting activities. The Plaintiffs' interest in serving on a jury is commendable. However, just as a person who professes membership in a religious cult could not assert a right to sit on a jury if litigants routinely exclude her when they exercise their strikes, Plaintiffs have no vested right to sit on a jury. This is not a matter whereby the Court should abstain from considering a Constitutional challenge to a state government practice; there is no colorable Constitutional challenge at issue. The argument that being excluded from jury service at any time in the jury selection process is without merit and fails to state a claim upon which relief may be granted.

With regard to the jury summons information form, it is undisputed that the Plaintiffs cannot be made to endorse any belief. The freedom to hold religious beliefs or not hold them is absolute. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).[2] Plaintiffs have not directly asserted in this cause that

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[2]This principle is consistently applied to other First Amendment utterances. For example, it is well established that school children cannot be forced to

they were made to endorse a religious belief or forego their own non-belief. If they were uncertain as to a penalty for not stating a religious preference, upon inquiry, they would have learned that they need not state a religious preference at all. Plaintiffs rely on the mere inquiry on the form and nothing more to establish a causal connection between the form and their dismissal from jury service and the violation of the principle of separation of church and state.

The information form aids in the dissemination of information about the jurors to litigants so that they may intelligently exercise their jury strikes. The form itself does not endorse a religious belief or the necessity of holding any religious belief. The information form is a rational and reasonable manner of implementing the substantial governmental interest of an efficient jury service which passes Constitutional muster to provide the right of trial by jury to civil and criminal litigants. Compare the reasoning of the Supreme Court in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) when it held that there was no free exercise violation since the "incidental burdens" imposed on religion were justified by a substantial governmental interest in procuring military manpower by a fairly and uniformly administered military draft system. In the case at bar, even if it were assumed that the burden on the Plaintiffs of reporting their belief may cause them to be excluded from a sitting jury, the "burden" is incidental and rationally justified by the substantial government interest.

With respect to the establishment clause, it is clear that a state church or religion is prohibited.[3] However, not every action by

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salute or say a pledge to the flag. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Similarly, a motorist cannot be punished for blocking out the portion of his automobile license plate which has the motto "Live Free or Die"; as long as he left the license plate in a condition that served its auto identification purpose, he did not have to display a slogan endorsed by the state. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

[3]The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Estab-

government that favors or benefits religion or the holding of religious belief is prohibited. The goal is a "benevolent neutrality" by the government respecting religion. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

Accordingly, it is established that despite the principle of separation of church and state, a state legislature can employ a chaplain and begin each legislative day with a prayer. Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 604 (1984). Similarly, a Christmas display in a public park is permissible. Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). It should be noted that in Lynch v. Donnelly, the Court determined that there was no religious purpose in the practice, the primary effect was not to confer an impermissible benefit on religion, and the Christmas display did not impermissible [*sic*] entangle government and religious authorities.

This Court should engage in similar analysis: whether the practice has a secular purpose, a principal or primary effect that neither advances nor inhibits religion, and does not produce excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). There are two practices implicated in the Plaintiffs' Complaint; the juror oath and the jury information form.[4] The jury oath has the secular purpose of conferring an atmosphere of formality on the jury deliberation and putting persons on notice of the seriousness of the proceedings. The reference to God, or swearing by God, is incidental to the oath. Thus, the principal or primary effect of the oath does not advance or inhibit religion; it advances the jury system. Though there is a colorable argument that reminding persons that oaths are as serious as the mostly [*sic*] deeply held religious beliefs causes an entanglement by the government with reli-

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lishment and Free Exercise Clauses of the First Amendment apply to the states under the Fourteenth Amendment.

[4]Plaintiffs have raised for the second time in Federal Court the issue of the judicial oath. This issue has been decided as between these litigants in a previous litigation. In the alternative, even under the notice pleading standard in Federal Court, the reference to Judicial oath in the Complaint is insufficient to state a claim.

gion, this argument is without merit. The oath is no more entangling than the reference to the deity in the pledge of allegiance and less entangling than a Christmas display, the inscription on legal tender "In God We Trust," or the payment out of the public treasury of religious leaders to serve in combat or convene the United States Congress. The jury oath does not violate the First Amendment establishment clause.

The jury information form, merely by requesting whether a person has a religious preference, is even less likely to give a state sanction to the holding of a religious belief. The secular purpose of the form has been discussed above. There is no primary effect which advances or inhibits religion. If an attorney relies on the information to exercise a strike on behalf of his client, there is only an incidental impact on the advancement or inhibition of the holding of a religious belief (or no religious belief) by a prospective juror. For the reasons stated above, there is no entanglement of any kind between the state and church.

For the foregoing reasons, the Court is of the opinion that Plaintiffs' Complaint does not state a cause of action under the United States Constitution for deprivation of protected interests or violation of the establishment clause of the First Amendment. Accordingly,

IT IS ORDERED that the cause is dismissed with prejudice as to the Federal claims. Any claims founded in state law appended to the federal claims in this cause are dismissed without prejudice.

SIGNED AND ENTERED, this, the 22nd day of March, 1989.

Lucius D. Bunton
Chief Judge

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-11463

JON G. MURRAY, ET AL.,
A-89-CA 1463

v.

TRAVIS COUNTY DISTRICT COURT and JIM MATTOX,
Attorney General of the State of Texas,

Appeal from the United States District Court
for the Western District of Texas
(A-87-CV-489)

(February 26, 1990)

Before WISDOM, JOHNSON and DUHÉ, Circuit Judges.

JOHNSON, Circuit Judge:[1] The dismissal is affirmed for the reasons stated herein, and in the district court's opinion which is appended hereto. See Local Rule 47.6.

In so affirming the district court's order, we note that such a dismissal in no way contradicts the holding of our en banc Court in O'Hair v. White, 675 F.2d 680 (5th Cir. 1982). In White, this

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Court took a close and careful look at the jurisdictional basis for O'Hair's claim in the federal court. Specifically, the Court inquired into whether O'Hair had standing to challenge the actions of the State of Texas in that case. As the Court noted, "the most fundamental aspect of the standing doctrine is that it focuses on the particular plaintiff seeking to bring his claim before the federal court, not on the issues or the merits of the case." Id. at 685. In a carefully drafted opinion, Judge Vance, writing for the majority, concluded that the plaintiffs alleged a sufficient injury and a sufficient causal connection to satisfy the constitutionally imposed requirements of standing. In so holding, however, the majority specifically noted that the Court did not "intimate any opinion as to whether the appellant has been deprived of any constitutional right or has been injured in any manner." Id. at 696. The Court emphasized that the decision was a narrow one which did not reach the merits of the claim.

In contrast in the instant case, the district court did not dismiss the plaintiffs' action because of a lack of standing. Rather, the district court dismissed the case because the plaintiffs failed to state a claim upon which relief can be granted. Specifically, the district court determined that because the right to serve on a jury is not a constitutionally protected one, the plaintiffs' cause of action had failed to state a claim. We agree. The occasion to serve on a jury is undeniably a duty, a privilege, and an opportunity for many citizens to actively and personally serve their government. Indeed, the opportunity for many citizens to serve on a jury might be the *only* opportunity they have to serve their government. Even so, jury service has not been construed as a constitutionally protected right. Moreover, as the plaintiffs concede, jurors are not required to swear an oath to a deity; rather, jurors are free to simply make an affirmation that the testimony which they are about to present will be the truth. An affirmation is no more than a solemn declaration made under the penalties of perjury. We do not consider, as plaintiffs would have us do, an affirmation to be the same as an oath to a deity.

Finally, in the context of plaintiffs' challenge to the question on the juror information card that asks for information regarding religion, we observe that atheism is indeed a relevant factor for

the parties and attorneys involved in the jury selection process — as much so as whether a potential juror is a Baptist, a Presbyterian or a Buddhist. Such information has undoubted relevance to the voir dire process and enables the parties, along with the bench and bar, to make informed and reasoned decisions when empaneling juries.

For these reasons, and those contained in the district court's opinion, we affirm.

AFFIRMED

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

No. 92-116

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SOCIETY OF SEPARATIONISTS, INC., et al.
. . . . . Petitioners,

v.

GUY HERMAN, JUDGE OF THE TRAVIS COUNTY PROBATE COURT #1, et al.
. . . . . Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED FOR REVIEW

Whether an atheist individual, who refused to make a non-religious affirmation to tell the truth when answering questions during jury service qualification, has standing to seek prospective declaratory relief against the then presiding judge on Free Exercise and/or Equal Protection grounds, either as an individual or as a class representative and/or as a coplaintiff with an atheist association?

LIST OF ALL PARTIES

ROBIN MURRAY-O'HAIR, and
SOCIETY OF SEPARATIONISTS, INC.,
Petitioners and Plaintiffs/Appellants below;

The HONORABLE GUY HERMAN, Judge
Travis County Probate Court #1,
Respondent and Defendant/Appellee below; and

The HONORABLE DAN MORALES, Attorney General
for the state of Texas,
Intervenor in the Court of Appeals.

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OPINIONS BELOW

On November 19, 1990, the United States District Court for the Western District of Texas, granted summary judgment in favor of Defendant/Respondent and against Plaintiffs/Petitioners. Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, (W.D. Tex. Nov. 19, 1990).

A panel of the Court of Appeals for the Fifth Circuit awarded declaratory relief in favor of Plaintiffs/Petitioners against Defendant/Respondent on August 28, 1991. Society of Separationists, Inc. v. Herman 939 F.2d 1224 (5th Cir. 1991).

On April 17, 1992, the Fifth Circuit, on rehearing en banc, overruled the panel decision previously issued, holding that the individual Plaintiff/Petitioner as well as the associational Plaintiff/Petitioner lacked standing to bring the action. Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir. 1992).

JURISDICTION

Petitioners have attempted to invoke the certiorari jurisdiction of this Court pursuant to 28 U.S.C. Section 1254. However, it is Respondent's contention that the en banc decision of United States Court of Appeals for the Fifth Circuit decided a question of federal law which has been well settled by this Court and which in no way conflicts the applicable decisions of this Court.

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below:

Petitioners, an individual and atheist organization filed suit on November 16, 1989, seeking preliminary and permanent injunctive relief, a declaratory judgment and damages against Guy Herman, Probate Judge of Travis County, Texas and other Travis County Defendants alleging specifically that the Defendants violated Petitioners Free Exercise rights. Petitioners suit was not brought nor ever certified as a class action. In fact, the District Court dismissed the associational Plaintiff. The District Court ruled for the Defendants on every issue and further held that all named Defendants were immune or not amenable to suit.

The United States District Court for the Fifth Circuit held that all named Defendants except for Judge Guy Herman were properly dismissed by the District Court but reversed that Court's dismissal of the associational Plaintiff. The Fifth Circuit panel then issued declaratory relief in favor of Petitioners and against Judge Herman.

Subsequently, on November 1, 1991, the Fifth Circuit ordered the case reconsidered en banc. As a result, on April 17, 1992, the Fifth Circuit, en banc, after receiving written briefs from both sides on the issue of the standing, overruled the prior panel decision, holding that the individual Petitioner lacked standing to seek prospective declaratory relief and that the associational Petitioner lacked associational standing.

Statement of Facts

Petitioner Murray-O'Hair was summoned to the Travis County Courthouse for jury duty along with a number of other citizens. When the group of prospective jurors of which Petitioner Murray-O'Hair was a member was asked to rise to take the statutorily required juror oath, Petitioner Murray-O'Hair objected to the oath on the grounds that she was an atheist. She was then called to the bench by Judge Herman, who inquired as to her refusal to take the oath. After stating her objections, Petitioner Murray-O'Hair was immediately offered an opportunity to make an affirmation. She refused to make an affirmation as well.

After the other jurors were sworn in, Petitioner Murray-O'Hair again appeared before Judge Herman, who made further inquiries about her refusal to take an affirmation. The judge again offered an affirmation, assuring her that the affirmation he was offering would be " ... without any recognition or any statement, any reference to God or anything of that nature ... ." Record Excerpt, Transcript of Contempt Hearing, p.3, 11.3-5. Her response was: "I cannot affirm, sir. That is just as religious as an oath," Id. at 11.7-8, and, later, "An affirmation, my understanding, is a religious statement." Record Excerpt, Transcript of Contempt Hearing, p.4, 11.1-2.

After repeatedly offering to allow Petitioner Murray-O'Hair to make a non-religious affirmation, after explaining that the law required her to make an oath or an affirmation in order to qualify for jury duty, after warning

her that if she refused to make either " ... an oath or an affirmation, ... " Id. at p.3, 1,12, she would be held in contempt of court, and after receiving nothing in response other than unqualified refusals to make either an oath or an affirmation, Judge Herman finally held Petitioner Murray-O'Hair in contempt of court and ordered her detained in the Travis County Jail. Petitioner Murray-O'Hair was released on bond approximately six (6) hours later and Judge Herman reduced her contempt sentence to time served. Subsequently, as a result of the forgoing incident, Petitioners filed this action.

SUMMARY OF ARGUMENT

Regardless of how broad and sweeping an effect the Petitioners would like their lawsuit to have on the Travis County jury system and the State of Texas, the fact remains that the only parties involved in this lawsuit are the Petitioner, Robin Murray-O'Hair, along with her co-Petitioner, the non-certified class, Society of Separationists, Inc., and the sole Respondent, Guy Herman, Presiding Judge, Probate Court Number One, Travis County, Texas. And despite how unconstitutional Petitioners assert that Rules 226 and 236 of the Texas Rules of Civil Procedure are along with the way in which they are implemented by the Travis County jury system, the only substantive issue asserted by Petitioners, in this action, is whether or not Judge Herman violated Murray-O'Hair's Free Exercise and/or Equal Protection rights by holding her in contempt for refusing to make a non-religious affirmation during jury service qualification.

Focusing on these simple yet key facts surrounding this litigation, the United States Court of Appeals for the Fifth Circuit, en banc concluded that Petitioners did not have standing to seek prospective declaratory relief against Respondent, Judge Herman.

Respondent argues that the Fifth Circuit correctly held that pursuant to Article III of the United States Constitution and this Court's decisions regarding and interpreting the same, Petitioners lack standing to bring this action. Specifically, Respondent asserts that there is no conceivable declaratory remedy available for Petitioners which would alter Respondent Judge Herman's behavior

towards Petitioner Murray-O'Hair. This is so because Petitioner suffers no continuing harm and has only demonstrated a conjectural or hypothetical threat of future injury stemming from Respondent Herman's conduct in 1987.

Additionally, Respondent asserts that the Fifth Circuit correctly held that Society of Separationists lacks associational standing according to this Court's decision in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977).

ARGUMENT

Introduction

The Petition for Writ of Certiorari should be denied because the en banc decision of the Fifth Circuit, holding that Petitioners lack standing to seek prospective declaratory relief against Respondent Herman, in no way conflicts with the well settled decisions of this Court on the issue of standing.

Article III of the United States Constitution limits the jurisdiction of the federal courts to determining actual cases or controversies. Allen v. Wright, 468 U.S. 737 (1984). Part and parcel of the Article III, 'actual case or controversy' requirement is the rule that a litigant must have standing to invoke the power of the federal courts. Id. at 750.

The doctrine of standing has been repeatedly defined by this Court as, "the requirement that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. (1991); *citing* Allen v. Wright, 468 U.S. 737 (1982); *citing* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

Due to the constraints imposed by Article III, Petitioners, Murray-O'Hair and Society of Separationists, do not have standing to seek declaratory relief. This is so because in actuality what Petitioners seek is an advisory opinion.

The lack of standing for Petitioner Murray-O'Hair and Petitioner Society of Separationists will be addressed separately in this brief.

Individual Standing

When making a standing inquiry, judicial examination of the plaintiff's complaint is necessary. Such an inquiry should include identifying the parties, the issues involved and the type of relief sought. One factor to be considered is whether or not the prospect of obtaining relief from the injury as a result of a favorable ruling is too speculative? Allen v. Wright, 468 U.S. at 753.

An examination of Petitioner's complaint shows that she, as an individual, and the Society of Separationists (the purported class which never obtained class certification under Rule 23, Federal Rules Civil Procedure) are seeking prospective declaratory relief against Respondent Judge Herman on the basis that he violated her Free Exercise and/or Equal Protection rights by holding her in contempt when she refused to make a non-religious affirmation during jury service qualification. Neither Travis County, Texas nor the State of Texas is a party to this action.[1]

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[1]In Petitioner's original complaint, Travis County, Texas, was named as a co-defendant but was dismissed by the District Court on grounds that Petitioners never established that her injury occurred pursuant to some policy or custom which represents the official policy of Travis County. The Court found that, Petitioner never pointed to any policy statement, ordinance, regulation, or other officially adopted decision by Travis County which was the moving force behind the deprivation she alleges. Nor did Petitioner identify another Travis County trial judge who may have held other jurors in contempt for

The constitutionally of Rules 226, Oath to Jury Panel, and 236, Oath to Jury, of the Texas Rules of Civil Procedure was never challenged by Petitioner's in their complaint.

When a plaintiff is seeking injunctive relief for a past exposure to illegal conduct, the plaintiff must show that she suffers continuing harm or a real and immediate threat of repeated injury in the future unless declaratory relief is granted. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

According to the Lyons decision, Petitioner lacks standing to obtain prospective declaratory relief. Petitioner does not suffer a continuing harm as a result of Judge Herman's actions. Nor can Petitioner show that she will in the future appear before Judge Herman as a prospective juror and that Judge Herman will exclude her from jury service and jail her for contempt. In fact, it would be a very remote possibility that Petitioner and Judge Herman would find themselves back in this situation with one another in the future. There are over one half million residents in Travis County and twenty six judges of varying types. Furthermore, Judge Herman's regular duties no longer include overseeing the jury qualification process. Therefore, although it is possible even probable,

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refusing to take a juror's oath. Moreover, Petitioner never asserted that Judge Herman was a policy maker for Travis County. Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, slip op. at 9 (W.D. Tex. Nov. 19, 1990). See Monell v. New York Department of Social Services, 436 U.S. 658 (1978). The dismissal of defendant Travis County was affirmed by both the panel and en banc decisions of the Fifth Circuit. Society of Separationists v. Herman, 939 F.2d 1224 (Fifth Cir. 1991); Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (Fifth Cir. 1992).

that at some point in Respondent's life she might be called for jury duty again, it is highly unlikely that she would appear before Judge Herman for jury impaneling, assuming that Judge Herman remained a judge of some sort in Travis County for the remainder of Petitioner's life. Clearly, based on the facts of this case, the only threat of future injury Petitioner can demonstrate is one that is purely conjectural, hypothetical and in no way immediate. *See* Lujan v. Defenders of Wildlife, ____ U.S. ____, 112 S.Ct. 2130 (1992); Golden v. Zwickler 394 U.S. 103 (1969).

It is apparent that based on this Court's decision in Rhodes v. Stewart, 488 U.S. 1 (1988), Petitioner is actually seeking an advisory opinion and not a declaratory judgment. As this Court stated, "The real value of a judicial pronouncement--what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion--is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*. Rhodes v. Stewart, 488 U.S. at 202, *citing* Hewitt v. Helms, 482 U.S. 755 (1987) (emphasis in original). Even if Petitioner in this case, received a favorable declaratory judgment it would not affect the behavior of Judge Herman towards her.

In her petition for Writ of Certiorari, Petitioner incorrectly relies on Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) and County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. 1161 (1991), in support of her argument that she has standing to seek declaratory relief. This case is entirely different from Carter and County of Riverside. This is so because unlike this case, the plaintiffs in Carter obtained class certification

and sued, alleged and proved that the County Jury Commission deliberately and systematically excluded blacks from Greene County juries. Whereas, in this case, class certification was never obtained and the only Defendant/Respondent is an individual. Likewise, in County of Riverside, the class certified plaintiffs, demonstrated the existence of a continuing harm as a result of the County's official policy of not providing probable cause determinations within thirty-six (36) hours of arrest. Petitioner has not shown that Judge Herman continuously and systematically excludes atheists from serving on juries nor has she demonstrated that she suffers a continuing harm as a result of her non-participation in jury duty in 1987.

Instead, Petitioner Murray-O'Hair, like the petitioner in City of Los Angeles v. Lyons, complains of one single incident which has altogether ceased before the filing of her complaint and therefore has no standing.

Petitioner also incorrectly relies on the line of cases coming from this Court which address the issue of juror exclusion on account race. Petitioner attempts to classify herself as an "excluded juror." To the contrary, Petitioner was not excluded from the jury, but refused to participate in the jury selection process by refusing to make a non-religious affirmation to tell the truth when answering voir dire questions. Petitioner wholly differs from the jurors in Powers v. Ohio, ____ U.S. ____, 111 S.Ct. 1364 (1991); Edmonson v. Leesville Concrete Co., ___ U.S. ___, 111 S.Ct. 2077 (1991); Georgia v. McCollum, No. 91-372, ___ U.S. _____ (1992) (decided June 18, 1992), who were excluded from jury duty solely on account of race.

Furthermore, assuming arguendo, that Petitioner is considered to be an "excluded juror," her reliance on Powers v. Ohio, Edmonson v. Leesville Concrete Co., and Georgia v. McCollum, is still misplaced. The Powers, Edmonson, and Georgia decisions held that when a prospective juror is struck by the use of a racially based peremptory challenge, then that juror's Equal Protection rights have been violated. Petitioner misinterprets those decisions to mean that an Equal Protection violation equals standing. That is not correct. In fact, this Court specifically noted in Powers v. Ohio, that a potential juror has daunting standing problems when seeking declaratory relief for an equal protection violation which was caused by the exercise of a racially based peremptory challenge. This is so because it is difficult for an individual juror to show a likelihood that discrimination will reoccur at the voir dire stage. Id. at 1373. Without evidence of a systematic practice, an excluded juror lacks standing to seek prospective relief.

Associational Standing

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), this Court held that,

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations purpose; and (c) neither the

> claim asserted nor the relief requested requires participation of individual members in the lawsuit.

The Society of Separationists does not meet the first and third requirements of the Hunt test.

The Associational Petitioner has not demonstrated that its members would otherwise have standing to sue in their own right. Remembering that Judge Herman is the only respondent in this case, the other Society members have not suffered any injury from the dismissal of Murray-O'Hair from the venire in 1987. Just because other Society members may agree with Murray-O'Hair's opinion regarding the oath or affirmation requirement, that is not sufficient to therefrom conclude that they have suffered actual injury. Warth v. Seldin, 422 U.S. 490 (1975). Therefore, since the other Society members have not suffered any injury, the Society does not have standing.

The Society also lacks standing under the Hunt test because their complaint requires the participation of individual members. The Society's complaint does not challenge the constitutionality of Rules 226 and 236 of the Texas Rules of Civil Procedure. Travis County, Texas, and the State of Texas are not parties to this suit. The Society complains of Judge Herman's actions in this isolated incident. The basis of the Society's complaint is a single episode between Murray-O'Hair and Judge Herman in December of 1987. Without Murray-O'Hair's participation, there would be no lawsuit. If Murray-O'Hair never appeared before Judge Herman, and if the

subsequent exchange between Murray-O'Hair and Judge Herman never took place, no lawsuit would exist.

Petitioners, disregarding the requirements of the Hunt test, assert, in support of their associational standing argument that this suit and Murray v. Travis County District Court, No. 89-1463 (5th Cir. Feb. 26, 1990), *cert. denied*, ____ U.S. ____ 111 S.Ct. 75 (1991), shows that Travis County has pattern of coercing potential jurors to make a religious statement and excluding them if they do not. This assertion is irrelevant and not compelling. First of all, Travis County is not a Respondent to this action. Judge Herman is the only named Respondent in this suit. Petitioners failed long ago to present any proof or establish that the alleged injury was the result of a policy or custom representing the official policy of Travis County. Secondly, other than Petitioner Murray-O'Hair, the Society is only able to point to one other unnamed individual who, they assert, was held in contempt for refusing to participate in the jury selection process. This is insufficient to establish a systematic exclusion of atheists and falls far short from establishing that the members of the Society have suffered actual injury.[2]

The fact the Society lacks standing under the Hunt test, is also consistent with the holding of Harris v. McRae, 448 U.S. 297 (1980), in which this Court held that a Free Exercise claim is one that ordinarily requires individual

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[2]In fact, Petitioners submitted only one affidavit of another individual, Keith Hailey, who refused to use the word affirm during jury service qualification. However, Mr. Hailey's affidavit did not indicate whether he was a member of the Society or not.

participation. Here, as in Harris, individual participation of the Society's members is essential for a proper understanding and resolution of their Free Exercise claims. Petitioners have only made a general assertion in their complaint they speak for their members. Yet, the Society never submitted any evidence indicating how many of its member's share Petitioner's view regarding the nature of an affirmation nor how any of its members were injured and in what way, by the dismissal of Murray-O'Hair from the venire.

Recently, this Court held that, the elements of standing "are not mere pleading requirements but rather an indispensable part of plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, ie., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 112 S.Ct. at 2130. Thus, under Lujan, it is clear that Petitioners fall far short of establishing the elements of standing.

The Society of Separationists was never certified as a class because it failed to meet the prerequisites for obtaining class certification under Rule 23, Federal Rules of Civil Procedure. Specifically, the Society presented no evidence that the class of individuals is so numerous that that joinder of all members would be impracticable.[3] The Society is a national organization of atheists. Yet, in light of its nationwide status, the Society failed to present any

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[3]Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, slip at 5.

evidence of how the issue in the lawsuit, which involves a Travis County Judge following a rule of state procedure, contains a question of law common to the nationwide class or how the out of state members are in need of having their rights protected through Murray-O'Hair's complaint. Instead of setting forth facts showing that the Society meets the requirements for class certification under Rule 23, the Petitioners simply made a vague assertion contained in their original complaint, purporting to represent "All individuals eligible for jury service who have deep seated convictions against mouthing any religious dogma as a condition to jury service."

Furthermore, there is no evidence in the record that other Society members even share Murray-O'Hair's opinion regarding the religious nature of an affirmation. In this case, the Society does not represent a certifiable class of similarly situated individuals and there is no real and immediate threat to such a class.

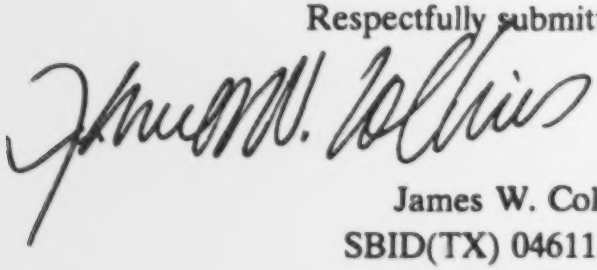
Yet, even if the Society does represent a certifiable class of similarly situated individuals, the Society would have to demonstrate that a case or controversy actually existed at the time the complaint was filed. County of Riverside v. McLaughlin, 111 S.Ct. at 1667. In this case, the alleged unlawful conduct by Judge Herman wholly subsided by the time Petitioners' complaint was filed.

Conclusion

As demonstrated above, the en banc decision of the Fifth Circuit, holding that Petitioners lack standing to seek prospective declaratory relief against Respondent Herman

is consistent with the well settled decisions of this Court. Therefore, no need exists for this Court to review the en banc decision of the Fifth Circuit and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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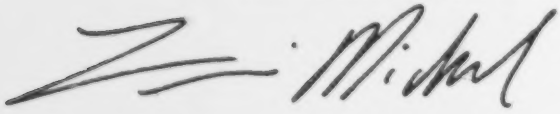

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CERTIFICATE OF SERVICE

I, James W. Collins, hereby certify that I have mailed copies of the foregoing Brief in Opposition to a Petition for Writ of Certiorari to:

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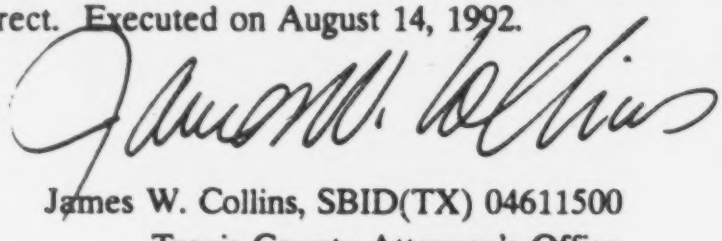
on the 14th day of August 1992, in duly addressed envelopes, with postage prepaid, return receipt requested.

I certify under penalty of perjury that the foregoing is true and correct. Executed on August 14, 1992.



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